United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,196

FRANCIS A. SIMPSON, JR., *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,197

JAMES T. SKEENS, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,198

JOHN C. RENNER, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,199

FEDORA A. FLANAGAN, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

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Appeal From the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. Did an affidavit, which was the sole basis for the issuance of a search warrant, demonstrate probable cause, where the observations of agents of the Federal Bureau of Investigation showed conduct that was not even suspicious; where the affidavit failed to set forth underlying circumstances to support the conclusion of confidential informants that defendants were operating a numbers business; where the affidavit failed to set forth underlying circumstances to support either the credibility of the informants or the reliability of their information.

2. Whether the prosecutor committed reversible error in suggesting to the jury in his closing argument that persons named on a Government Exhibit seized in the execution of a search warrant were not brought in as witnesses because they would have refused to talk or taken the Fifth Amendment, where the record was devoid of any such evidence, and was the error compounded by the Court's failure to instruct the jury to ignore the remarks.

3. Where a witness has knowingly and voluntarily aided, abetted and assisted criminal activity, and has admitted to such activity, should the Court submit to the jury the issue as to whether or not the witness is an accomplice. Further, is another witness, who is on the premises, aware of the fact that a numbers operation is being conducted, and who places bets with that operation, an accomplice.

4. Is it error to allow a jury to separate after they have begun to deliberate on a verdict even though they receive instructions relating thereto, and further should a jury in a six-day trial be permitted to deliberate for more than two full days.

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

On April 5, 1963, Appellants (hereinafter called defendants) were charged in a six-count indictment with: interstate travel in aid of a gambling enterprise, 18 U.S.C. § 1952;[1] operation of a lottery, 22 D.C. Code (1961 ed.) § 1501; possession of number slips, 22 D.C. Code (1961 ed.) § 1502; maintaining gambling premises, 22 D.C. Code (1961 ed.) § 1505; and conspiracy to violate each of the above referred to statutes, 18 U.S.C. § 371 (J.A. ii, 12).[2]

Trial commenced October 7, 1964 (J.A. ii). On the morning of October 20, 1964, having deliberated since October 15th, the jury returned a verdict of guilty on count 4 of the indictment with respect to each defendant (possession of number slips, 22 D.C. Code, § 1502) (J.A. 48, 49). Later, that day, the jury reported it was hopelessly deadlocked, and a mistrial as to counts 1, 2, 3, 5, and 6 was ordered by the Court (J.A. ii). On December 11, 1964 each of the defendants was sentenced to imprisonment for the maximum term of one (1) year, with the exception of defendant, Fedora Flanagan, who was placed on probation (J.A. 18, 19). Notices of appeal, by each defendant were filed the same day (J.A. 19, 20).

The jurisdiction of this Court is based on 28 U.S.C. § 1291.

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[1] Appellant, Flanagan, was not charged with this violation.

[2] Appellants were initially indicted for the same offenses in January 1963, Crim. No. 12-63. Following motions to dismiss several counts of the indictment for failure to state crimes, and the Court's denial of the same, Appellants were re-indicted.

STATEMENT OF THE CASE

On October 15, 1962, twenty two agents of the Federal Bureau of Investigation, armed with three arrest warrants[3] and a search warrant, obtained from the United States Commissioner in the District of Columbia, swooped down on premises 1452 Ogden Street, N.W., Washington, D.C. The arrest of the four defendants followed, together with the seizure of a large number of exhibits which were subsequently offered in evidence by the prosecution at defendants' trial.[4]

Subsequent to indictment, defendants moved to suppress the evidence seized in the raid, challenging the legal sufficiency of the affidavit which was the basis for the issuance of the search warrant and alleging that their rights under the Fourth Amendment to the Constitution of the United States had been violated (J.A. 13). The District Court denied the motion (J.A. 13). At trial, objections, on the same grounds, to the Government's proffer of evidence seized in the raid, were overruled (Tr. 261, 322, 326, 340). Renewal of the motion to suppress, at trial and in post verdict motion was also denied (J.A. 16, Tr. 389, 554, 555). It cannot be doubted that all the evidence supporting defendants' convictions of possession of number slips consisted of the exhibits seized in the raid and testimony concerning the same. See footnote 4 supra.

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[3] The arrest warrants were for defendants, Simpson, Skeens and Flanagan.

[4] These included Government Exhibits Nos. 11, 11A, 11B, 11C, 12, 13A, 13B, 13C, 13D, 13E, 13F, 13G, 13H, 13I, 13J, 13K, 13L, 13M, 13N, 13O, 14A, 14B, 15, 16A, 16B, 16C, 16D, 17, 18, 19, 20A, 20B, 20C, 20D, 20E, 20F, 21A, 21B, 22, 23A, 23B, 24, 25 and 26.

These exhibits included specific items taken from the furnace located in the basement of said premises; diagram of the basement area; photographs of the basement area where the evidence was seized; money; disconnected telephones; radio; broken adding machine; papers; tablets; lists of names and telephone numbers; and fingerprints.

Oral testimony included, besides identification of the above listed exhibits, a detailed report of the raid; expert testimony with respect to the exhibits found therein and their relation to gambling, and expert fingerprint testimony.

The Search Warrant

Like Gaul, the six page affidavit, executed by ten special agents of the Federal Bureau of Investigation, may be divided into three parts. The major portion of the affidavit consists of observations of the four defendants by agents between August 7, 1962 and October 11, 1962, excluding the periods: August 10-19th; August 22-September 30th; and October 6-7th (J.A. 3-11). These observations consist of: seeing the defendants, Skeens and Renner driving their automobiles in the State of Maryland; seeing the defendant, Simpson, driving his automobile in the State of Virginia; observing the defendants, Simpson, Skeens and Renner sitting at a table in the Hot Shoppe Restaurant around lunchtime; and viewing the defendants entering and leaving premises 1452 Ogden Street, N.W., Washington, D.C. (J.A. 3-9).[5] All of this activity is remarkably similar to what thousands of people residing in suburban areas and working in Washington, D.C. do everyday. No improper activity of any description was observed.[6]

The second section of the affidavit comprises a recital of the defendants' prior infractions of the law (J.A. 9-10). The third section is devoted to allegedly reliable information furnished by informants that defendants were engaged in the gambling business (J.A. 3).

At Trial

During the execution of the search warrant, agents found a box containing slips of paper, one of which listed names and telephone numbers.[7] This was proffered as the typical paraphernalia of a gambling establish-

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[5] Defendants, Simpson, Renner and Skeens were also seen in the vicinity of 6214 Third Street, N.W., Washington, D.C. (J.A. 3-5).

[6] At trial these agents admitted that these observations indicated no misconduct of any description (Tr. Vol. I, 97-99; 105, 106, 114-118; Vol. II, 126, 127, 144, 145, 186, 187, 210, 211, 221, 228, 232).

[7] Government Exhibit No. 20C (J.A. 50).

ment. There was no further testimony concerning the persons whose names appeared on the exhibit or their connection, if any, with the defendants. Government counsel, in his vituperative closing argument to the jury informed them that if the Government had gone to these people (those listed in Government Exhibit No. 20C) they would say, "I am not saying anything, or I am taking the Fifth Amendment . . . " (J.A. 32). Objection was immediately made, but overruled by the Court without correcting the error or attempting to minimize or eliminate the prejudice resulting therefrom (J.A. 32, 33).

Mr. Charles Richardson, a Government witness, testified that he knowingly and voluntarily leased a part of premises 6214 Third Street, N.W., Washington, D.C. to the defendant, Skeens, for the purpose of conducting a gambling establishment.[8]

Mr. Louis McMurray, an employee of Mr. Richardson, operating out of the same premises, testified that he saw the three defendants there; that they told him it was a numbers operation (T.R. Vol. 1, p. 53, 55); that he placed two bets with them by telephone (T.R. Vol. 1, p. 57).[9]

Defendants requested the Court to instruct the jury that Mr. Richardson and Mr. McMurray were accomplices (J.A. 15, 16). Instead, the Court granted the accomplice instruction requested, but left it to the jury to determine whether Mr. Richardson was an accomplice (J.A. 35-37). The Court further held that Mr. McMurray was not an accomplice and so instructed the jury (J.A. 36, 37).

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[8] Richardson testified that when he discussed leasing the premises with the defendant, Skeens, he was told that the purpose was to conduct a numbers operation (TR. Vol. 1, p. 6); that he went ahead and rented in to Skeens (Tr. Id. p. 7); that Skeens told him his telephone number would be protected through the use of an answering service (TR. Id. p. 7); that the office which he rented to Skeens was used for a numbers business (Tr. Id. p. 8); that he saw the defendants taking number bets over the telephone (Tr. Id. p. 11).

[9] See 22 D.C. Code (1961 ed.) §§ 1508, 1515.

Following the charge, the jury received the case on October 15, 1964. On October 20, 1964 they returned a verdict of guilty as to each defendant on count 4 of the indictment (J.A. ii, 48, 49).

At approximately 5:00 o'clock p.m. on Thursday, October 15, 1964 the jury was released and allowed to separate to go to their homes (J.A. 39, 40). They returned the next morning and deliberated until 5:10 o'clock p.m., when they were once again released and directed to return to Court on Monday morning, October 19, 1964 (J.A. 40-43). Defendants objected to the further deliberation of the jury at this time (J.A. 41). The objection was overruled by the Court (J.A. 42). On Monday afternoon, at 5:00 o'clock p.m. the same procedure was followed (J.A. 43, 44). Defendants moved for a mistrial and the motion was denied (J.A. 44). On Tuesday morning, the jury reported that it was hopelessly deadlocked (J.A. 45). Shortly thereafter, on inquiry being made, it reported the verdict of guilty on all defendants with respect to Count 4 of the indictment (J.A. 48, 49).

Subsequent to the verdict, defendants moved for a new trial, setting forth the issues contained in this brief (J.A. 16, 17). The motion was denied (J.A. 17, 18). Following entry of judgment, an appeal by each defendant was noted (J.A. 19, 20).

STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rules of Criminal Procedure, Rule 4(a)

Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Federal Rules of Criminal Procedure, Rule 41(c) and (e)

Rule 41. Search and Seizure

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisified that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which

the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

The Act of March 3, 1901, c. 854, § 863a as added by Act of April 5, 1938, 52 Stat. 198, c. 72, § 2, and amended by Act of June 29, 1953, 67 Stat. 95, c. 159, § 206(a); 22 D.C. Code (1961 ed.) 1502.

Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

STATEMENT OF POINTS

1. The affidavit of agents of the Federal Bureau of Investigation which was the basis for the issuance of arrest and search warrants did not furnish probable cause, where direct observations, recited therein, failed to show even suspicious conduct on the part of the defendants, and where the conclusions of informants that a numbers operation was being conducted was unsupported by any underlying circumstances either with respect to the credibility of the informants, the reliability of the information, or the information itself.

2. It was reversible error for the prosecutor in his closing argument to the jury to inform them that the Government did not call certain persons as witnesses, because they would have refused to talk or would have taken the Fifth Amendment. The Court was under a duty once objection was made, to not only inform the jury to disregard the remarks, but to correct the same, and its failure to do so, made the remarks, which constituted unsworn testimony, all the more prejudicial to the defendants.

3. The Court should not submit to the jury for their deliberations the issue of whether a person is or is not an accomplice, where the witness voluntarily admits to being an accomplice.

4. A witness, who knowingly and voluntarily is present at the scene of an alleged numbers operation, who is aware of its existence, and who participates therein by placing bets is an accomplice and it was error for the Court to hold otherwise, and particularly to inform the jury that the witness was not an accomplice.

5. Permitting a jury to separate, at the close of each day and over a weekend, when they have begun to deliberate is prejudicial error. Permitting a jury to deliberate for more than two full days in a six-day trial is also wrong and the practice should be corrected.

SUMMARY OF ARGUMENT

Probable cause for the issuance of arrest and search warrants may not be predicated upon an affidavit which sets forth the conclusion of informants that a numbers operation is being conducted at a particular location, where the affidavit fails to contain any underlying circumstances demonstrating the basis: for the informant's conclusions, for his alleged credibility; and for determining that his information is reliable.

Nor can probable cause be founded upon the basis that the prospective defendants have prior criminal records. An affidavit in support of the issuance of arrest warrants and a search warrant does not establish probable cause where the direct observations of agents set forth therein, show not even suspicious conduct, and where the informant's conclusions are unsupported by any underlying circumstances. In such circumstances, a motion to suppress evidence seized during the execution of a search warrant issued on the basis of such an affidavit, should be granted.

A prosecutor goes far beyond the bounds of permissible advocacy, where he informs the jury in his closing argument, without any support in the record, that had he called certain persons as witness to testify they would have refused to talk or taken the Fifth Amendment. The obvious error was compounded when the Court failed to instruct the jury to disregard the remark. The Court's overruling of an objection to the remarks of the prosecutor, in addition to the statement being made by one occupying an official position, plus the remarks themselves which constituted unsworn testimony, unfairly prejudiced the defendants.

A witness, who knowingly and voluntarily admits to having aided and abetted the operation of a numbers game is an accomplice, as a matter of law, and it is error to submit to the jury the issue of whether he was an accomplice.

A witness who knowingly and voluntarily admits to being present at the scene of an alleged numbers operation, and who further participates therein by placing bets, is an accomplice. It was error for the Court to hold that the witness was not an accomplice, and to so instruct the jury.

A jury, once having begun deliberations, should not be permitted to separate, particularly over a weekend. Nor should a jury be permitted to over-deliberate on a case. This Court in its role of exercising supervision over the administration of criminal justice in this jurisdiction ought to prohibit such practices, which have become all too prevalent. In the instant case, the jury, over objection, was permitted not only to separate on several occasions but also to deliberate for more than two full days in a case which required only six days to try.

ARGUMENT

I.

The Court Erred Prejudicially in Failing To Grant Defendants' Motion To Suppress, and in Admitting in Evidence Numerous Exhibits and Testimony Procured as the Result of the Execution of a Search Warrant, Which Was Issued Without Probable Cause.

The affidavit which was the basis for the issuance of a search warrant for a private dwelling house in the District of Columbia, by the United States Commissioner and the arrest warrants, was challenged in the Court below as being legally insufficient. The issue is whether this affidavit demonstrates probable cause to believe that a crime was being committed at these premises and that certain gambling paraphernalia was located therein.

The affidavit may be divided into three parts. The major portion consisting of observations by special agents of the Federal Bureau of Investigation is limited to facts showing that the defendants Skeens and Renner drove their automobiles in the State of Maryland; that the defendant, Simpson, drove his automobile in Virginia; that all four defendants were seen en-

tering premises 1452 Ogden Street, N. W., Washington, D. C. on different days; that all four of the defendants were seen leaving the premises at different times; that three of the defendants were seen at the Hot Shoppe Restaurant "at a table" around lunchtime. The activity described in the major portion of the affidavit was completely normal. [10] There was nothing unusual about this activity, and it is undoubtedly performed countless times each day by residents of this area. The premises they were seen entering and leaving had no special reputation. They were not seen with, or carrying, the usual type of gambling paraphernalia, such as bulging pockets, brown bags, etc. No conversations were overheard by the agents; nor did they participate in the placing of any bets. Their activity did not involve the exchanging of monies, packages or unknown objects, which had it occurred, might not have been totally innocuous, but nevertheless would not have constituted probable cause. *Perry v. United States*, ___ U.S. App. D.C. ___, 336 F.2d 748 (1964). Without any stretch of the imagination, the activity observed by the agents, which constituted almost the entire affidavit, did not even furnish suspicion of criminal activity, let alone probable cause.

The second phase of the affidavit deals with information provided by informants. [11] This also was legally insufficient to demonstrate probable cause.

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[10] At trial, Agents of the Federal Bureau of Investigation who made these observations, conceded that they saw no misconduct on the part of any of the defendants. See footnote 6, supra, p. 3.

[11] "Information was received from sources that have proven to be reliable on numerous occasions in the past that Francis A. Simpson is conducting a numbers operation consisting of processing his daily numbers work and receiving numbers bets at the above premises, information is that he was also operating gambling premises for horse and baseball bets.

"Confidential informants have furnished information that Francis A. Simpson and his associates have moved their place of gambling operations quite frequently in order to evade detection. They have been known to operate at 6214 Third Street, N.W., Washington, D.C.

"According to the above reliable sources the above-mentioned individuals have from time to time been employed with Francis A. Simpson in his numbers operations at one or more of the above addresses." (J.A. 3).

United States v. Ventresca, ___ U.S. ___, 33 L.W. 4193, decided March 1, 1965, *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, and *Jones v. United States*, 362 U.S. 257 (1960) clearly establish that although an affidavit may be based on hearsay information, from unnamed sources, the magistrate must be informed of some of the underlying circumstances from which the informant concluded his conclusions, and some of the underlying circumstances from which the affiant concluded that the informant was credible, and some of the underlying circumstances from which the affiant concluded that the informant's information was reliable.

Applying this test to the instant case, we find that the informants allege that Simpson is conducting a numbers, horse and baseball betting operation; that he and his associates, the other listed individuals, have been known to operate at 6214 Third Street, N.W., Washington, D.C.; that they move their place of gambling operation frequently to avoid detection.

Each of the above matters is a conclusion. Not one underlying circumstance or objective fact is set forth. The informant does not state that he placed a bet at the Third Street location with one of the defendants; nor does he state that the informant observed betting going on there at a designated time. All we have is a set of conclusions which for all the magistrate who issued the search warrant and the arrest warrants knew, was merely suspicion or rumor on the part of the informants, or even hearsay as to them derived from some other source.

With respect to the requirement of setting forth underlying circumstances to manifest that the informant is credible and that his information is reliable, the only thing set forth in the instant affidavit is that the sources have proven to be reliable on numerous occasions in the past. Reliable concerning what? Criminal activity? Or providing the time of the day or the weather or what have you. How can the Commissioner determine that the informant is credible, without some underlying circumstances which would indicate his credibility.

Nor does this affidavit provide us with information as to the informant's reliableness with respect to the information he provides. We don't know where, how, when, or in what manner he obtained this information. For all we know, and for all the Commissioner knew, the informant might have heard a rumor in some distant city. In fact his statement that the operation was moved frequently to avoid detection is unsupported by the observations of the special agents.

One has only to compare this affidavit with the affidavit in *Jones v. United States, supra,* to see that the underlying circumstances which must be demonstrated are so completely lacking in the instant case. Or, compare if you will, the affidavit in *United States v. Ventresca, supra.*[12] For all we know, in the instant case, the informants may have been other

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[12] The lack of underlying circumstances is clearly demonstrated by reference to the affidavits in *Jones v. United States*, *supra*, and *United States v. Ventresca*, *supra*. As this Court has pointed out in
the Supreme Court in *Jones*, *supra*, indicated that the commissioner who issued the search warrant could have decided either way on the issue of whether probable cause had been shown. *Jones v. United States*, *supra*, at p. 271.

The affidavit in *Jones v. United States*, *supra*, at p. 267, n.2, recited that, ". . . The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment . . . on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreted in the above mentioned places. The last time being August 20, 1957." (The date was the day before the warrant was applied for.) In addition both of the persons whose premises were to be searched had admitted to the use of narcotics and had displayed needle marks as evidence of the same. Further, the same information had been received from other sources.

In *United States v. Ventresca*, *supra*, the affidavit contained the following direct observations: an automobile was driven to the rear of Ventresca's house where on four occasions it carried loads of sugar in 60 pound bags; the automobile made two trips with empty tin cans; once it was observed heavily laden. The automobile was loaded at Ventresca's house and unloaded later on, apparently full of five gallon cans; the cans were filled when they left Ventresca's house; investigators smelled the odor of fermenting mash as they walked in front of Ventresca's house at 4 a.m.; at about the same time they heard metallic sounds; the day prior to the application for a warrant, while smelling fermenting mash they heard a pump or motor coming from the direction of Ventresca's house. 33 L. Week 4194.

agents who suspected the defendants, and thus were credible persons who provided reliable information on numerous occasions. See footnote 4, page 114 in *Aguilar v. Texas, supra.*

The last phase of the affidavit is devoted to a recital of the criminal records of the defendants, and the fact that some of them have an F.B.I. identification number, whatever that is. As the Supreme Court has recently said, an officer's knowledge of the criminal record of the defendant may not be entirely irrelevant in determining the issue of probable cause, but to hold that the knowledge of the same constitutes probable cause would be to hold that anyone with a previous criminal record could be arrested at will. *Beck v. United States,* 379 U.S. 89 at 97 (1964). The fact of a criminal record is given little weight in determining probable cause. *Perry v. United States, supra,* (a known addict), *Pigg v. United States,* 8th Cir., 337 F.2d 302 (1964), (a known thief), *Conti v. Morgenthau* (USDC S.D. N.Y.) 232 F. Supp. 1004 at 1008 (1964), (known to be associated with bookmakers - affidavit with respect to obtaining search warrant of Conti's automobile).

Although the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests without warrants, and although in a doubtful or marginal case preference is to be accorded to warrants, that is not to say that probable cause can be made out by affidavits which are purely conclusory, merely detailing the informant's belief without any of the underlying circumstances which gave rise to that belief. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. It is only when these circumstances are detailed, that a particular affidavit may present a marginal case. It is then, and only then, that any preference is to be given to the action of the magistrate is issuing the warrant. *United States v. Vestresca, supra,* 33 L. Week 4194, 4195.

Defendants' convictions were obtained entirely on evidence seized in the execution of the search warrant, and the oral testimony relating thereto. See footnote 4, *supra*, page 2. The search warrant, having been issued without probable cause, defendants' motion to suppress should have been granted,[13] and the physical evidence and oral testimony resulting therefrom excluded at trial. The failure to do so deprived defendants of their rights under the Fourth Amendment to the Constitution of the United States.

II.

The Prosecutor's Remarks in His Closing Argument to the Jury, and the Court's Refusal To Correct the Same, Deprived Defendants of a Fair Trial

Counsel for the defendants, in his argument to the jury, left it to their conjecture, when he posed the question, that if Government Exhibit No. 20C were in fact a gambling slip, wouldn't the Government have brought in the people whose names appeared thereon and asked them whether they placed bets with the defendants (J.A. 30, 31).[14]

In response the prosecutor went far beyong the limits of propriety when he said that there aren't wire taps around to prove what went on between those telephones — "If they say: I am not saying anything, or I am taking the Fifth Amendment, what can you do?" (J.A. 31, 32). After immediate objection, the Court failed not only to correct the remarks of the prosecutor, but failed to minimize or eliminate the prejudice resulting therefrom by some instruction (J.A. 32, 33).

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[13] Federal Rules of Criminal Procedure, Rules 4(a), 41(c), and 41(e).

[14] These persons were obviously traceable through the telephone numbers which appeared next to their names. This document was in the possession of the Government from the date of the raid until trial. These people were obviously ". . . in a legal sense a stranger to defendant(s)." *Egan v. United States*, 52 App. D.C. 384, 287 F. 958 (1923). Even were the persons equally available to both sides, the comment of the prosecutor went far beyond the limits of fair advocacy.

This was not advocacy but unsworn testimony which to the best of our knowledge was false.[15] The only inference which the jury could have obtained from this exchange was that the prosecutor had attempted to bring these persons, whose names appeared on Government Exhibit 20C, as witnesses for the trial, but they refused to talk and some took the Fifth Amendment. The very fact that this was the Assistant United States Attorney who stated this, because of his official position, gave more credence to the alleged fact, and thus was more prejudicial. *Pritchett v. United States*, 87 U.S. App. D.C. 374 at 376, 185 F.2d 438 (1950). There was no basis of fact for the assertion. *Pritchett v. United States, supra.*

The error was compounded by suggesting that the witnesses would have taken the Fifth Amendment. From this statement, the jury, as average laymen, probably drew the inference that these persons whose names appeared on the Government Exhibit No. 20C had something to hide, and were probably involved in betting or gambling with the defendants. The Supreme Court has said:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury by claiming the privilege.
>
> * * *
>
> "On the other hand the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. *Grunewald v. United States*, 353 U.S. 391, at 421, and 424 (1957).

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15 *Stewart v. United States*, 101 U.S. App. D.C. 51, at 54, 247 F.2d 42 (1957).

III.

The Trial Court Erred in Instructing the Jury on the Issue of Accomplices.

Whoever knowingly and voluntarily cooperates with, aids, or abets another in criminal activity, regardless of the degree of his guilt is an accomplice and his testimony must be subjected by the jury to grave scrutiny, *Egan v. United States,* 52 App. D.C. 384, 287 F. 958 (1923). Whether one is or is not an accomplice, if disputed, is for the discretion of the court. But where the facts are admitted, then as a matter of law, the Court must grant such an instruction. *Egan v. United States, supra,* at page 390.

In the instant case, both Mr. Richardson and Mr. McMurray admitted to their voluntary and knowing participation in criminal activity.[16] Mr. Richardson admitted, knowingly, leasing a place for the purpose of having a gambling operation therein conducted. Mr. McMurray was aware of the same and admitted having telephoned two bets to the place. Yet, the Court refused to hold Mr. McMurray as an accomplice and so informed the jury, thus indicating that his testimony did not have to be scrutinized with great care as being that of an accomplice.[17] On the other hand, despite the admissions of Mr. Richardson, the Court left the question of whether he was or was not an accomplice to the jury for them to decide. Both instructions were error. *Egan v. United States, supra.* Both instructions prejudiced the defendants, as their testimony helped to demonstrate that the slips in the possession of the defendants at the time of the execution of the search warrant were in fact gambling papers and not something else.

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[16] See *supra*, p. 4 and footnote 8, p. 4.

[17] 22 D.C. Code (1961 ed.) §§ 1508, 1515. Mr. McMurray was clearly engaged in criminal activity which aided and abetted the defendants, if his admissions were truthful.

The Court should have instructed the jury that both witnesses were accomplices and then have given them the accomplice instruction. The Court's failure to do so was prejudicial error.

IV.

The Trial Court Erred in Allowing the Jury To Separate After They Had Begun Deliberations, and in Permitting Them To Deliberate Longer Than Necessary.

The jury in the instant case, was charged and commenced deliberations on October 15, 1964, a Thursday. At evening they were released and returned presumably to their homes. They returned to Court the following morning and deliberated all day. At the close of the day they were again released and allowed to separate until Monday morning, October 19, 1964. They returned on Monday morning and again deliberated all day without reaching a verdict. Monday evening they separated and finally on Tuesday they returned a verdict on Count 4 of the indictment and remained hopelessly deadlocked on the other five counts of the indictment.

Defendants' objections to this procedure, at least to the jury being allowed to continue to deliberate were denied on Friday evening, and defendants' motion for mistrial was denied on Monday evening.

At no time is it more important that the jury should be kept together than when they are deliberating. To permit them to separate at the close of each day, also permits their minds to be effected and influenced by all sorts of extraneous data. The evening newspaper, or their conversation with a neighbor, although not involving the particular case, may affect their judgment. Reading of other crimes being committed may affect their judgment. In the instant case, the jury was allowed to separate not only each day but also over an entire weekend. This was error. *United States v. D'Antonio*, 7th Cir., ___ F.2d ___, 33 L. Week 2428 (Decided February 9, 1965).

In conjunction with this point, it is equally wrong to permit juries to deliberate for extended periods of time, not merited by the particular case. This was a six-day trial. Two full days of deliberation, plus one hour, after receiving the charge, was more than ample time to reach a fair decision. To permit over deliberation is to allow the internal pressures that come into play in a jury room, after prolonged deliberation, determine the verdict, rather than the fair, impartial, and calm consideration to which both sides are entitled.

Permitting juries to deliberate for extended periods of time, a practice too frequently indulged in, in this jurisdiction, should receive the attention of this Court in its role of supervising the administration of criminal justice within this circuit.

CONCLUSION

It is respectfully submitted that the judgment of the United States District Court for the District of Columbia should, for the reasons hereinbefore advanced, be reversed, and a new trial granted.

EDWARD L. CAREY

WALTER E. GILLCRIST

821 Fifteenth Street, N.W.
Washington, D.C., 20005

Attorneys for Appellants

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RELEVANT DOCKET ENTRIES

1963	
April 15	Copy of indictment given to defendants Arraigned. Plea Not Guilty entered
April 15	Recognizance in the sum of $1,000
May 13	Motion of defendants to dismiss Counts one and two of the indictment; Motion for discovery and inspection; Motion for suppression of evidence
Nov. 8	Withdrawal of motion for inspection and discovery; Motion for suppression of evidence and motion to dismiss Counts 1 and 2 denied. Curran, J.
1964	
Oct. 7	Jury impanelled; trial begun. Matthews, J.
Oct. 8	Trial resumed.
Oct. 12	" "
Oct. 13	" "
Oct. 14	" "
Oct. 15	Jury retires to consider its verdict; excused at 5:00 p.m.
Oct. 16	Jury returns at 10:00 a.m.
Oct. 19	Jury returns at 10:00 a.m.; excused at 5 p.m.
Oct. 20	Jury returns at 10:00 a.m. Verdict: Guilty on Count 4 (possession of numbers slips) and the jury is unable to agree upon a verdict as to any of the defendants in any of the remaining counts. Mistrial declared by the Court as to Counts 1, 2, 3, 5 and 6. Jury is discharged and the case is passed. Case is referred to the Probation Officer of the Court.
Oct. 30	Motion for Judgment of Acquittal notwithstanding verdict or in the alternative for a new trial.
Nov. 9	Order denying in all respects motion for Judgment of Acquittal notwithstanding verdict or in the alternative for a new trial, Matthews, J.
Dec. 11	[Defendants 1, 2, 3] Sentenced to imprisonment for a period of one year. No. 4: Imposition of sentence suspended; defendant placed on probation in charge of the probation officer of the Court for a period of two years.
Dec. 11	[All defendants] Notice of appeal.

1965

Jan. 7	No. 4: Fedora Flanagan. Motion of Defendant to quash subpoena.
Jan. 7	No. 4: Oral Motion of Government for leave to dismiss the indictment heard and granted. Dismissal entered. McGuire, J.
Jan. 8	No. 4: Motion of Government to amend oral motion of 1-7-65 so that only those counts of the indictment remaining to be tried be dismissed, heard and granted. Dismissal of indictment on 1-7-65 vacated and set aside. Remaining counts of indictment yet to be tried are dismissed. Dismissal entered as to remaining counts. McGuire, J.
Jan. 11	No. 4: Opposition to motion to quash subpoena filed.
Jan. 11	No. 4: Motion of Defendant to quash subpoena heard, argued and denied without prejudice to renewal after defendant appears to testify before the Grand Jury and if she refuses to answer questions; Appearance of Edward L. Carey and Walter Gillcrist, withdrawn with approval of the court. Appearance of Vincent L. Fuller and Robert L. Weinberg as counsel for defendant entered and filed. Pine, J.

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Commissioner's Docket No. 6

Case No. 353

United States of America

v.

Premises:
1452 Ogden St. N.W.
(entire premises)
Washington, D. C.

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE F.B.I. OR ANY OTHER OFFICER AUTHORIZED TO SERVE SAME.

Affidavit having been made before me by Special Agts. of the F.B.I.: Joseph E. Battle; Lansing P. Logan; John B. Cuskelly; Thomas R. Swartz; Philip C. Lewis; Jack Evans Hehl; James W. Sibert; Winfred H. Anders; Richard T. Marquise & John B. Hammit. that he has reason to believe that on the premises known as 1452 Ogden St. N.W. - entire premises Washington in the District of Columbia there is now being concealed certain property, namely lottery tickets, lottery policies, run down tapes, horse bets, baseball bets, or any book, paper, record, memorandum or device used in setting up, promoting or maintaining a policy lottery and any other gambling paraphernalia used in conducting the various gambling operation involved herein which are in violation of Title 22 D.C. Code, sections 1501 and 1502 and Title 18 U.S. Code, sections 371 and 1952. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 12th day of October, 1962

/s/ Sam Wertleb
U. S. Commissioner.

RETURN

I received the attached search warrant October 12th, 1962, and have executed it as follows:

On October 15th, 1962 at 6:15 o'clock P.M, I searched the premises described in the warrant and

I left a copy of the warrant with Charles E. Shirley together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

See attached receipt

This inventory was made in the presence of Charles E. Shirley and Dolores Mae Shirley

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

_____

Subscribed and sworn to and returned before me this day of , 19 .

_____,
United States Commissioner.

AFFIDAVIT

Affidavit in support of application for United States Commissioner's arrest warrants for violations of Title 18, Section 371, United States Code; Title 18, Section 1952, United States Code; and Title 22, Section 1501 and Section 1502, District of Columbia Code for the persons mentioned as follows:

Francis A. Simpson;
James Thomas Skeens;
Fedora Flanigan

and in support of a Commissioner's search warrant for the premises located at 1452 Ogden Street, N.W., Washington, D.C.

STATEMENT:

Information was received from sources that have proven to be reliable on numerous occasions in the past that Francis A. Simpson is conducting a numbers operation consisting of processing his daily numbers work and receiving numbers bets at the above premises. Information is that he was also operating gambling premises for horse and baseball bets.

Confidential informants have furnished information that Francis A. Simpson and his associates moved their place of gambling operations quite frequently in order to evade detection. They have been known to operate at 6214 Third Street, N.W., Washington, D.C.

According to the above reliable sources the above-mentioned individuals have from time to time been employed with Francis A. Simpson in his numbers operations at one or more of the above addresses.

The following named Agents were assigned to conduct an investigation and the results of their investigation is set out as follows:

On August 7, 1962, at 6:18 p.m., Special Agent Philip C. Lewis observed James Thomas Skeens to enter his 1961 blue Chevrolet Impala, Maryland License Tags DH 2167, that was parked in the vicinity of 6214 Third Street, N.W.

On August 6, 7, 8, and 9, 1962, during the afternoon hours, Special Agent Joseph Emmett Battle observed a 1962 black Corvair Chevrolet bearing Maryland Tags DM 4797, known to be registered to John Charles Renner's wife, Betty, and used by him, parked in the vicinity of 6214 Third Street, N.W.

On August 20, 1962, at 11:11 a.m., Special Agents Joseph Emmett Battle and Richard T. Marquise and Winfred H. Anders observed Francis A. Simpson, Jr., to enter and sit down at a table in the Hot Shoppe, located at Georgia Avenue and Gallatin Street, N.W.

On August 20, 1962, at 11:38 a.m., Simpson was observed to be joined by John Charles Renner.

On August 20, 1962, at 12:09 p.m., Simpson, Renner and James Thomas Skeens were observed by Special Agents Joseph Emmett Battle, Richard T. Marquise and Winfred H. Anders to depart the Hot Shoppe. Simpson and Renner entered a 1962 black Ford Fairlane, bearing 1962 Virginia License plates 236979, known to be used by Simpson and proceeded east on Gallatin Street, N.W. Skeens was observed to enter a 1962 Ford Galaxie, light blue in color, bearing D.C. License GT 354. He was observed at 12:11 p.m., driving southwest on Arkansas Avenue, N.W., from Georgia Avenue, N.W.

On August 20, 1962, at 12:23 p.m., the 1962 Ford Fairlane operated by Simpson was observed parked in the rear of 6214 Third Street, N.E., by Special Agents Joseph Emmett Battle, Richard T. Marquise and Winfred H. Anders.

On August 20, 1962, at 6:25 p.m., Simpson and Renner were observed by Special Agents Joseph Emmett Battle, Richard T. Marquise and Winfred H. Anders walking north through the alley located in the rear of 6214 Third Street, N.W., and to enter Simpson's automobile which was at that time parked on Sheraton Street, N.W., and proceed to the vicinity of Third and Kennedy Streets, N.W.

On August 21, 1962, at 11:12 a.m., Special Agent Richard T. Marquise observed a 1962 black Ford Fairlane, Virginig License 236-979

operated by Simpson parked in the Hot Shoppe parking lot, Georgia Avenue and Gallatin Street, N.W., and observed Simpson sitting at a table at the Hot Shoppe.

On August 21, 1962, at 11:56 a.m., John Charles Renner was observed by Special Agent Richard T. Marquise driving the black Chevrolet Corvair, Maryland tags DM 4797, in the vicinity of the Hot Shoppe, Georgia and Gallatin Street.

On August 21, 1962, at 12:00 noon, Simpson and Renner were observed by Special Agent Richard T. Marquise to enter the Chevrolet Corvair and proceed south on Georgia Avenue. Simpson was observed to leave his automobile parked on the Hot Shoppe lot.

On August 21, 1962, at 6:24 p.m., Special Agents Joseph Emmett Battle and Richard T. Marquise observed Simpson and Renner coming out of the alley behind 6214 Third Street, N.W., toward Sheraton Street, wherein they entered the 1962 Chevrolet Corvair, Maryland License DM 4797 and proceed west on Sheraton Street, N.W.

On August 21, 1962, at 6:33 p.m., Simpson and Renner were observed by Special Agents Joseph Emmett Battle and Richard T. Marquise entering the Hot Shoppe parking lot, Georgia Avenue and Gallatin Street, N.W., where Simpson departed and entered his 1962 Ford Fairlane, Virginia License 236979 that was parked in the same location as he had left it in the morning.

On August 21, 1962, at 6:36 p.m., Simpson and Renner were observed by Special Agents Joseph Emmett Battle and Richard T. Marquise driving from the Hot Shoppe parking lot in their individual automobiles.

On October 1, 1962, at 10:19 a.m., Special Agent John B. Hammett observed James Thomas Skeens driving his Chevrolet Impala, Maryland License DH 2167, on Woodlawn Avenue, Landover Hills, Maryland, proceeding toward Washington, D.C.

On October 1, 1962, at 10:23 a.m., Special Agent James W. Sibert observed John Charles Renner depart his residence, 2004 Erie Street, Adelphi, Maryland, driving his blue and white Oldsmobile, Maryland License BF 8260.

On October 1, 1962, at 11:32 a.m., Special Agent John B. Cuskelly observed Francis A. Simpson, John Charles Renner and James Thomas Skeens walking across Ogden Street, N.W., in the 1400 block from the north side to the south side and thereafter enter the residence located at 1452 Ogden Street, N.W.

On October 1, 1962, at 6:29 p.m., Special Agent John B. Cuskelly observed Francis A. Simpson and James Thomas Skeens depart from the residence at 1452 Ogden Street, N.W.

On October 2, 1962, at 11:05 a.m., Special Agent Thomas R. Swartz observed James Thomas Skeens in his Chevrolet Impala, Maryland License DH 2167, on Route 450 proceeding toward Washington, D.C.

On October 2, 1962, at 11:45 a.m., Special Agents John B. Cuskelly and Joseph Emmett Battle observed James Thomas Skeens enter 1452 Ogden Street, N.W.

On October 3, 1962, at 11:53 a.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson and James Thomas Skeens enter 1452 Ogden Street, N.W.

On October 3, 1962, at 7:08 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson and James Thomas Skeens depart 1452 Ogden Street, N.W.

On October 4, 1962, at 11:50 a.m., Special Agent Thomas R. Swartz observed James Thomas Skeens in his Chevrolet Impala, Maryland License DH 2167 on Route 450 proceeding toward Washington, D.C.

On October 4, 1962, at 9:15 a.m., Special Agent Jack Evans Mehl observed Francis A. Simpson in the automobile operated by him, Virginia License 236-979, proceeding on Washington Street, Alexandria, Virginia, toward Washington, D.C.

On October 4, 1962, at 11:58 a.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson enter the residence at 1452 Ogden Street, N.W.

On October 4, 1962, at 12:15 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed James Thomas Skeens enter 1452 Ogden Street, N.W.

On October 4, 1962, at 6:07 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson and James Thomas Skeens leaving 1452 Ogden Street, N.W.

On October 5, 1962, at 11:11 a.m., Special Agent Jack Evans Mehl observed Francis A. Simpson in the automobile operated by him, Virginia License 236-979, proceeding on Washington Street, Alexandria, Virginia, toward Washington, D.C.

On October 5, 1962, at 11:47 a.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson and Fedora Flanigan enter the residence at 1452 Ogden Street, N.W.

On October 5, 1962, at 6:23 p.m., James Thomas Skeens was observed by Special Agents John B. Cuskelly and Philip C. Lewis emerging from the residence of 1452 Ogden Street, N.W.

On October 8, 1962, at 10:51 a.m., Special Agent Philip C. Lewis observed Fedora Flanigan enter the residence at 1452 Ogden Street, N.W.

On October 8, 1962, at 11:53 a.m., Francis A. Simpson was observed by Special Agent Philip C. Lewis to enter the residence at 1452 Ogden Street, N.W.

On October 8, 1962, at 4:07 p.m., Special Agent Philip C. Lewis observed James Thomas Skeens to enter the residence at 1452 Ogden Street, N.W.

On October 8, 1962, Special Agent Philip C. Lewis observed, at 6:38 p.m., James Thomas Skeens exiting from an alley alongside 1450 Ogden Street, N.W., and walk west on Ogden Street.

On October 9, 1962, at 10:49 a.m., Special Agent Jack Evans Mehl observed Francis A. Simpson in the automobile driven by him, Virginia License 236 979, proceeding on Washington Street, Alexandria, Virginia, toward Washington, D.C.

On October 9, 1962, at 11:25 a.m., Special Agent Thomas R. Swartz observed James Thomas Skeens and wife, Marsha, driving in their Chevrolet Impala, Maryland License DH 2167 on Route 450, Annapolis

Road, vicinity Cooper Lane, proceeding toward Washington, D.C.

On October 9, 1962, at 11:43 a.m., Special Agent John B. Cuskelly observed Fedora Flanigan to enter the residence at 1452 Ogden Street, N.W.

On October 9, 1962, at 12:10 p.m., Special Agent John B. Cuskelly observed James Thomas Skeens to enter the residence at 1452 Ogden Street, N.W.

On October 9, 1962, at 12:38 p.m., Special Agent John B. Cuskelly observed Francis A. Simpson to enter the residence at 1452 Ogden Street, N.W.

On October 9, 1962, at 6:00 p.m., Special Agent John B. Cuskelly observed James Thomas Skeens to emerge from 1452 Ogden Street, N.W.

On October 9, 1962, at 6:17 p.m., Special Agent John B. Cuskelly observed Francis A. Simpson and Fedora Flanigan to emerge from the residence at 1452 Ogden Street, N.W.

On October 10, 1962, at 11:02 a.m., Special Agent Jack Evans Mehl observed Francis A. Simpson in the automobile driven by him, Virginia License 236 979, proceeding on Washington Street, Alexandria, Virginia, toward Washington, D.C.

On October 10, 1962, Special Agent Thomas R. Swartz observed James Thomas Skeens at 11:20 a.m., driving his Chevrolet Impala, Maryland License DH 2167 on Annapolis Road, Route 450, proceeding toward Washington, D.C.

On October 10, 1962, at 11:35 a.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson to enter 1452 Ogden Street, N.W.

On October 10, 1962, at 11:41 a.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Fedora Flanigan to enter 1452 Ogden Street, N.W.

On October 10, 1962, at 12:15 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed James Thomas Skeens to enter 1452 Ogden Street, N.W.

On October 10, 1962, at 6:08 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed James Thomas Skeens to emerge from 1452 Ogden Street, N.W.

On October 10, 1962, at 6:14 p.m., Special Agents John B. Cuskelly and Philip C. Lewis observed Francis A. Simpson and Fedora Flanigan to emerge from 1452 Ogden Street, N.W.

On October 11, 1962, at 11:34 a.m., Special Agent Lansing P. Logan observe Francis A. Simpson in an automobile being driven by him, Virginia License 236 979 proceeding on Washington Street, Alexandria, Virginia, toward Washington, D.C.

On October 11, 1962, at 12:08 p.m., Special Agent Philip C. Lewis observed Francis A. Simpson and Fedora Flanigan to enter 1452 Ogden Street, N. W.

On October 11, 1962, at 1:17 p.m., Special Agent Philip C. Lewis observed James Thomas Skeens to enter the residence of 1452 Ogden Street, N. W.

On October 11, 1962, at 6:08 p.m., Special Agent Philip C. Lewis observed James Thomas Skeens emerge from 1452 Ogden Street, N. W.

On October 11, 1962, at 6:18 p.m., Special Agent Philip C. Lewis observed Fedora Flanigan and Francis A. Simpson emerge from 1452 Ogden Street, N. W.

It is known that Francis A. Simpson has been arrested in the past for lottery and horse bets by the Arlington County Police Department, Arlington, Virginia, on April 28, 1955. Francis A. Simpson has Federal Bureau of Investigation Identification Number 200 704 E.

It is known that James Thomas Skeens has been arrested in the past for investigation of possession of gambling equipment on November 9, 1957, tampering with a slot machine on May 30, 1962, assault with a deadly weapon and carrying a deadly weapon on February 15, 1949.

Facts concerning this latter arrest, as contained in the records of the District of Columbia Jail, reflect that James Thomas Skeens on February 15, 1949, was arrested by officers of the Metropolitan Police

Department. James Thomas Skeens drove from Baltimore, Maryland, to a poolroom located in the 900 block of 9th Street, N. W., Washington, D.C., in order to collect payment of a $165 gambling debt from one Eddie Ryan. In the ensuing argument, Skeens shot Ryam with a .38 Smith and Wesson revolver. On April 29, 1949, Skeens was found guilty by jury and was sentenced to a term of 16 months to four years. James Thomas Skeens has Federal Bureau of Investigation Identification Number 1 979 929.

On July 11, 1951, Skeens was released on parole where he was to take up employment in Princeton, West Virginia, and to receive parole supervision in that jurisdiction. Later on June 10, 1952, Skeens' parole was revoked inasmuch as he failed to comply with the instructions issued him by the parole officer. It was determined that he had left the jurisdiction without permission and that he had been working and associating with known gamblers in the area at that time. Skeens was confined until November 6, 1953, the expiration of his maximum term at which time he was released without any parole supervision or restriction.

Dennis Eugene Sikes, 11410 Rosedale Avenue, Beltsville, Maryland, advised on June 26, 1962, upon being released from Casualty Hospital, Washington, D. C., that he was beaten up at a "poolroom" located at 812 H Street, N. W., Washington, D. C., on June 15, 1962, by James Thomas Skeens, John Charles Renner and three other unknown individuals. He stated this beating was the result of Skeens feeling that he (Sikes) had "welched" on a baseball bet.

Fedora Flanigan was arrested on January 21, 1961, by Arlington County Police Department, Arlington, Virginia, for violation of the lottery laws.

John Charles Renner was arrested on May 30, 1962, on a charge of tampering with a slot machine. Renner has Federal Bureau of Investigation Identification Number 5 109 545.

Based upon the information received and the observations made by

Special Agents of the Federal Bureau of Investigation, it is firmly believed that Francis A. Simpson, James Thomas Skeens, and Fedora Flanigan are conducting a numbers operation at 1452 Ogden Street, N. W., Washington, D. C., which is in violation of the laws of the United States and those of the District of Columbia, particularly Title 18, Section 371, United States Code; Title 18, Section 1952, United States Code; Title 22, Sections 1501 and 1502, District of Columbia Code.

Furthermore, it is the principal belief of the undersigned Agents that there is secreted within the premises of 1452 Ogden Street, N.W., Washington, D. C., numbers slips, run down tapes, records, horse bets, baseball bets and records pertaining thereto, and other gambling paraphernalia used in conducting the various illegal gambling operations in violation of the District of Columbia criminal statutes.

/s/ Joseph Emmett Battle
Special Agent

/s/ John B. Cuskelly
Special Agent

/s/ Philip C. Lewis
Special Agent

/s/ James W. Sibert
Special Agent

/s/ Richard T. Marquise
Special Agent

/s/ Lansing P. Logan
Special Agent

/s/ Thomas R. Swartz
Special Agent

/s/ Jack Evans Mehl
Special Agent

/s/ Winfred H. Anders
Special Agent

/s/ John B. Hammett
Special Agent

Subscribed and sworn to before this 12th day of October, 1962.

/s/ Sam Wertleb
United States Commissioner in and for the District of Columbia

INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding A Criminal Term

Grand Jury Sworn in on November 6, 1962

The United States of America	:	Criminal No. 314-63
v.	:	Grand Jury No. Original
Francis A. Simpson, Jr.	:	
James T. Skeens	:	
John C. Renner	:	Violation: 18 U.S.C. 1952
Fedora A. Flanagan	:	(Interstate Travel in Aid of Gambling Enterprise) 22 D.C.C. 1501, 1502, (Operating lottery) (Possession of numbers slips) 22 D.C.C. 1505 (Maintaining a Gambling Premises) 18 U.S.C. 371 (Conspiracy)

The Grand Jury charges:

* * *

FOURTH COUNT:

On or about October 15, 1962, within the District of Columbia, Francis A. Simpson, Jr., James T. Skeens, John C. Renner and Fedora A. Flanagan, knowingly had in their possession and under their control, notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

A TRUE BILL:

* * *

[Filed May 15, 1963]

MOTION FOR SUPPRESSION OF EVIDENCE

Come now the defendants, in the above captioned cause, by their attorneys, and move this Honorable Court to suppress any and all evidence seized by agents of the Federal Bureau of Investigation on or about October 15, 1962 when they conducted a raid on premises 1452 Ogden Street, N. W., Washington, D. C. for the following reasons:

1. The search warrant and the warrants of arrest were insufficient on their face.

2. There was not probable cause for believing the existence of the grounds on which the search and arrest warrants were issued.

3. The warrants were illegally executed.

And for grounds of this motion, the Court is referred to the points and authorities attached hereto, and the affidavit of Dolores Shirley, executed March 15, 1963 and filed in Criminal No. 12-63 as an attachment to a motion to suppress in the same cause involving the same defendants, all of which is made a part hereof.

Edward L. Carey

Walter E. Gillcrist
Attorneys for Defendants

[Filed November 8, 1963]

ORDER
[Clerk's Entry]

On this 8th day of November, 1963, came the Attorney for the United States; the defendants by counsel, Edward L. Carey, Esquire, whereupon the motion of defendants for the suppression of evidence, coming on to be heard, after argument of counsel and taking of testimony, is by the Court denied;

Whereupon, the motion of defendants to dismiss Counts 1 & 2 of the indictment, coming on to be heard, is by the Court denied.

By direction of

Edward M. Curran
Presiding Judge

[Filed October 15, 1964]

[Clerk's Entry of Jury Deliberations]

On this 15th day of October, 1964, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday afternoon; whereupon the said jury, after hearing the arguments of counsel and the instructions of the Court, alternate jurors William O. Hopkins and George A. Maxwell are discharged from further consideration in this case; and thereupon the said jury retires at 4:10 p.m. to consider their verdict.

The said jury is excused at 5:00 p.m. to return into Court tomorrow morning at 10:00 a.m. to resume their deliberations.

By direction of

Burnita Shelton Matthews
Presiding Judge

[Filed October 16, 1964]

[Clerk's Entry of Jury Deliberations]

On this 16th day of October, 1964, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause; whereupon the said jury returns into Court at 10:00 a.m. to resume

their deliberations; and thereupon the jury is excused at 5:00 p.m. to return into Court on Monday morning, October 19, 1964, at 10:00 a.m. to resume their deliberations.

By direction of

Burnita Shelton Matthews
Presiding Judge

[Filed October 19, 1964]

[Clerk's Entry of Jury Deliberations]

On this 19th day of October, 1964, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause; whereupon the said jury returns into Court at 10:00 a.m. to resume their deliberations; and thereupon the jury is excused at 5:00 p.m. to return into Court at 10:00 a.m. tomorrow morning, Tuesday, October 20, 1964.

By direction of

Burnita Shelton Matthews
Presiding Judge

[Filed Oct. 20, 1964]

DEFENDANTS' REQUEST FOR INSTRUCTIONS NO. 1

Dolores - You are instructed that the Government witnesses, Louis McMurray, Chas. Shirley and Chas. Richardson are what is known in the law as accomplices. Although their testimony is competent for your consideration, and although it may be as probative as any other testimony, yet, such a fact is less likely to be true, and their testimony

should be received by you with extreme caution and should be scrutinized by you with great care, before giving any credence to the same.

Authority:

McQuaid v. United States, 91 U.S. App. D.C. 229
Surratt v. United States, 106 U.S. App. D.C. 49
Bishop v. United States, 100 U.S. App. D.C. 88
Eagen v. United States, 52 App. D.C. 384.

[Filed October 30, 1964]

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL

Come now the defendants, in the above captioned cause, by their attorney, and move this Honorable Court to grant to each of them judgment of acquittal on the count of the indictment on which they were convicted, notwithstanding the verdict of the jury or in the alternative for a new trial, and for grounds of this motion state as follows.

1. The evidence adduced by the Government was insufficient to permit the jury to consider the cause and in particular Count IV of the indictment and judgment of acquittal on said Count should have been granted.

2. The Court erred in failing to grant defendants' motion to suppress evidence.

3. The Court erred in failing to instruct the jury, as requested by defendants, that Mr. McMurray and Mr. and Mrs. Shirley were accomplices. The Court erred in failing to instruct the jury, as requested by defendants, on the inferences to be drawn from the destruction of notes by Federal Bureau of Investigation Agents.

4. The Court erred in admitting in evidence Government's Exhibit No. 2, a large chart, and permitting the same to remain on constant

view to the jury, each day, to the prejudice of the defendants; and in failing to permit the defendants to use said chart in the process of their cross-examination of witnesses. In connection therewith the Court erred in granting Government's Request for Instructions No. 7.

5. The trial Court erred in failing to grant defendants' motion for mis-trial and objections to the prosecutor's inflammatory and prejudicial comments to the jury with respect to alleging that the agrument of defendants' counsel consisted of character assassination, and further in commenting on the failure of the Government to call certain persons as witnesses because they would invoke the Fifth Amendment.

6. Defendants' renew all motions heretofore made and denied.

7. For such other and further reasons as shall be brought to the attention of the Court at the hearing on this motion.

Wherefore, defendants pray that this Honorable Court enter judgment of acquittal or in the alternative grant to them a new trial.

Edward L. Carey
Attorney for Defendants

[Filed, Nov. 9, 1964]

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL n.o.v. OR IN THE ALTERNATIVE FOR A NEW TRIAL

Upon consideration of the motion filed herein October 30, 1964 for Judgment of Acquittal n.o.v. or in the Alternative for a New Trial, and it appearing to the court that from the evidence adduced at the trial reasonable minds might fairly conclude guilt beyond a reasonable doubt and therefore that so much of said motion as seeks a judgment of acquittal n.o.v. should be denied and that the alleged errors of the court mentioned in said motion do not warrant a new trial, it is by the court this 9th day of November, 1964.

ORDERED that the said motion be and it is hereby denied in all respects.

/s/ Burnita Shelton Matthews
Judge

A TRUE COPY
TEST:
Harry M. Hull, Clerk,

By /s/ Margaret E. DiToto
Deputy Clerk

[Filed December 14, 1964]

JUDGMENT AND COMMITMENT

[As to Defendants Nos. 1, 2, and 3]

On this 11th day of December, 1964, came the attorney for the government and the defendant appeared in person and by counsel, Walter E. Gillcrist, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Section 1502, Title 22 of the D.C. Code

as charged in count number four, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

One (1) Year

/s/ Burnita Shelton Matthews

[Filed December 14, 1964]

JUDGMENT AND COMMITMENT

[As to Defendant No. 4]

On this 11th day of December, 1964, came the attorney for the government and the defendant appeared in person and by counsel, Walter E. Gillcrist, Esquire.

It is Adjudged that the defendant has been convicted upon her plea of not guilty and a verdict of guilty of the offense of

Violation of Section 1502, Title 22 of the D.C. Code

as charged in count number four, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,,

~~It is Adjudged that the defendant is guilty as charged and convicted.~~

It is Adjudged that the imposition of sentence be and the same is hereby suspended and that the defendant be and she is hereby placed on probation in the charge of the Probation Officer of the Court for a period of Two (2) Years.

/s/ Burnita Shelton Matthews

[Filed December 11, 1964]

NOTICE OF APPEAL

[As to Defendant No. 1]

Name and address of appellant: Francis D. Simpson, Jr.

Name and address of appellant's attorney: Edward L. Carey, Walter E. Gillcrist, 821 15th St., N.W., Washington, D.C.

Offense: Possession of number slips.

Concise statement of judgment or order, giving date, and any sentence:

Dec. 11, 1964 sentenced to one (1) year imprisonment

* * *

I, the above named appellant hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above stated judgment.

/s/ Francis A. Simpson, Jr.

Dec. 11, 1964

[Notice of Appeal of Defendants 2 and 3 identical to the above Notice of Appeal of Defendant No. 1 except for names of said defendants, James T. Skeens and John C. Renner]

[Filed December 11, 1964]

NOTICE OF APPEAL
[As to Defendant No. 4]

Name and address of appellant: Fedora A. Flanagan

Name and address of appellant's attorney: Edward L. Carey, Walter E. Gillcrist, 821 15th St., N.W., Washington, D.C.

Offense: Possession of number slips.

Concise statement of judgment or order, giving date, and any sentence:

Dec. 11, 1964, sentenced ~~to one (1) year imprisonment~~ suspended execution thereof and placed on probation for 2 years.

* * *

I, the above named appellant hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above stated judgment.

Dec. 11, 1964 /s/ Fedora A. Flanagan

EXCERPTS FROM PROCEEDINGS

[Before Honorable Burnita Shelton Matthews, United States District Judge, on October 7, 1964.]

[3] THE CLERK: Case of United States v. Francis A. Simpson, Jr., James T. Skeens, John Renner, and Fedora Flanagan.

* * *

[52] LOUIS McMURRAY

called as a witness by the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JOYCE:

Q. Would you state your name and your occupation? A. My name is Louis McMurray and I am occupied as a plumber.

* * *

Q. Are you in court today pursuant to a subpoena served upon you? A. Yes.

Q. Do you recognize any of the defendants sitting at the table here? A. Yes.

Q. Would you point to them and tell us how you knew them, [53] by what name you knew them? The one on this side of the table, on the near side? A. I know him as Mr. Skinner.

Q. And the one at the end of the table? A. I knew him as Jiggs.

Q. Have you ever seen the young lady at the table? A. The gentleman on the end of the table, I knew him as Jack.

Q. And how about the young lady in the middle? A. I have never seen the young lady before.

Q. And the defendant in the gray suit? A. I knew the gentleman as Jiggs.

Q. Now, directing your attention to July of 1962, where were you then employed? A. I was employed by the H & R Air Conditioning Company, 6214 3d Street, N. W.

Q. During that time, had you seen the defendants, any of them? A. I saw the defendants there, yes.

Q. Did you see all of them there? A. Excluding the young lady.

Q. How often did you see them during July and the early part of August, 1962? A. The time that I knew the defendants, I saw them every day.

[54] Q. Where were they, when you saw them every day? A. In the office.

Q. Do you recall what they were doing? A. Yes, sir.

Q. Would you tell the Court and jury what they were doing at that time? A. They was in the office, they was answering telephones, writing on pads of paper and using an adding machine.

Q. All three male defendants were doing that, is that correct? A. Yes, I saw all three of them doing it.

Q. Did you ever have a conversation with any of the defendants about what they were doing there? A. Yes.

Q. With whom? A. I would say that I spoke to Jiggs and Mr. Skinner.

Q. And what did they tell you about that operation?

MR. CAREY: Objection, unless we pinpoint the date when this conversation took place.

THE COURT: Could you state the approximate time, when this was, that you say you saw them every day, the year and the month?

THE WITNESS: I first met the defendants either the first or the middle part of July 1962.

BY MR. JOYCE:

[55] Q. Did there come a time when they left the premises at 6214? A. Yes, there did.

Q. Do you recall when that was? A. I would say three to four weeks after they first came there.

Q. Would that be around the first week in August or second week?
A. First or second week in August, yes.

Q. During the period between the middle of July and the first or second week in August, did you have a conversation with either of the defendants? A. I had a number of conversations with all three of the defendants.

Q. With respect particularly to their operation? A. Yes.

Q. Which defendant? A. Mr. Jiggs.

Q. What did Mr. Jiggs tell you about the operation? A. That it is a numbers operation.

Q. Did you have a conversation with any of the defendants as to the reason for their leaving 6214 in the first or second week in August?
A. Yes.

Q. With whom did you have that conversation?
[56] A. Mr. Skinner

Q. Would you tell the Court and the jury what Mr. Skinner said about leaving the premises there? A. I asked him what had happened and he said that the law was closing in on them, that he suspected this, and they moved the operation or whatever you want to call it, out of there.

Q. At the time that they were conducting this numbers operation at 6214 3d Street, did you ever have occasion to place a bet with them?
A. Yes.

Q. What type of bet? A. Played a number.

MR. JOYCE: I have nothing further.

CROSS-EXAMINATION

BY MR. CAREY:

* * *

[57] Q. How many times did you place bets at this alleged operation?
A. Twice.

Q. Did you hit on either occasion? A. I did not.

Q. Who was present at the time you made these bets? A. I made the bets over the telephone when I called up the shop.

Q. Oh, you didn't make these bets in person? A. No, I spoke with Mr. Jiggs on the telephone.

Q. The two bets were placed with whom? A. I placed the bets with Mr. Jiggs.

* * *

[58] Q. Did you ever arrange to have any telephones placed in this particular place? A. I did not arrange to have any telephones put in this particular place.

Q. Were you ever present at any time when telephones were placed there? A. I was.

Q. When was that? A. Two nights before I met the defendants, I mean two days before the defendants moved into the place.

Q. Oh, this occurred before these three defendants were on the premises? A. I would say that the defendants was -- at least two of the defendants was present when the telephones was being hooked up, they brought their own telephone man, sir.

Q. You say you were present when two telephones were placed there, is that correct? A. The telephones, one telephone was brought in there, the best of my knowledge, there was already phones in the place but not hooked up, as extensions.

Q. How many were there, initially? A. To the best of my knowledge, I remember two telephones in the place.

Q. These two telephones you say were present, were [59] placed there before you met the defendants? A. Yes, the telephones, the two I am mentioning, were there.

Q. How long was it before you met the defendants that these telephones were placed in there? A. That I couldn't answer, because I went to work for the company in June of that year.

Q. Would you estimate a month, six weeks or less than a year's period? A. No, but I might be able to look it up on the bill.

Q. No, I didn't ask you that. I am asking you to recall when these telephones were placed there? A. I told you, sir, I went to work for that company in June 1962 and the phones that I am speaking of right now, they was in the place of business when I went to work there. Now, is that clear enough for you, sir? As far as that goes, they was hooked up, when before, sir, I don't know.

Q. How about these additional telephones that were placed in there, that's what I am talking about? A. The additional telephones placed in there, the telephone that I saw, was placed in there the first night that I met two of the defendants and they was brought there by a man supposedly from the telephone company.

Q. Did you know he was coming there? A. Yes, I knew he was coming there.

[60] Q. What time of the day was it? A. It wasn't in the day, it was in the evening, at night, after dark.

* * *

[62] Q. What was your purpose in being in these premises about 8 or 8:30 this particular night when the telephones were brought in by this telephone man? A. I was waiting for them.

Q. Who told you to be there? A. Chuck Richardson.

Q. Did he tell you why you were to be there? A. Yes.

Q. Did he tell you to assist in putting these phones into operation? A. He did not.

Q. What, specifically, did he tell you, Mr. McMurray? A. The word that I got is that the gentlemen were coming up and that they was going to be there, they was going to be working in the office and just go ahead and let them do what they wanted to do.

Q. Did he tell you the purposes for which these phones were being put in 3d Street, N. W.? A. Yes.

Q. And how long were you there on this particular [63] evening? A. I would say I left that evening about 11:30 or 12 o'clock that evening.

Q. Did you ever report this activity to the police or the District of Columbia during the period when these men were allegedly there? A. I did not.

Q. Did you ever report it to the FBI during the time when these men were allegedly operating a numbers cell? A. I did not.

Q. When is the first time you spoke to anybody in authority about this particular "numbers" operation? A. After the defendants, the gentlemen that I know that was there, after they had already left the place, I was approached by two agents of the FBI and I was asked as to what was happening and what was going on.

Q. When was this, Mr. McMurray? A. I don't rightfully -- I can't give you the hour and the date, but I would say it was about a week after the gentlemen had left out the place.

Q. Did you give a written statement to the FBI? A. I made a statement, I don't know whether it was written or not.

Q. Did you sign a statement? A. I don't remember whether I did or not. I did give [64] them a statement, though.

Q. You what? A. I did make a statement to them.

Q. Did you sign that statement? A. As I say, I don't remember whether I did or not. If I made it, I probably signed it.

* * *

[68] Did you ever protest about this place being used as an alleged numbers operation? A. The only thing that I protested to or anything is I told Chuck --

Q. Who is Chuck? A. Charles Richardson -- that I didn't think that the phones was being answered the way they should and I only mentioned that one time and then I forgot about it.

Q. Did you ever protest about this place being used as a numbers operation? A. I did not.

Q. You placed bets there yourself on several occasions, didn't you? A. I called two numbers in over the telephone, yes.

Q. Did you report this to the police? A. I told you before, I did not.

* * *

[383] EDWARD PENNYPACKER,

having been previously called as a witness by the Government, and having been reminded he was still under oath, resumed the stand, was examined and testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. COLEMAN:

* * *

[384] Q. Did you find any other materials in the basement? A. Yes, I did.

Q. And where did you locate those? A. At a point right approximately here. There was an air conditioner which was not hooked up and some other boxes along on this air conditioner that was a shoe box. That shoe box contained some five by eight tablets and loose paper, five by eight pieces of paper.

* * *

[386] BY MR. COLEMAN:

Q. Agent Pennypacker, I will show you what has been marked for identification, Government's 20A, 20B, 20C, 20D, 20E, 20F, and Government's 21A and 21B, and I will ask you, sir, whether or not you can identify those exhibits. A. Yes, I can.

Q. And would you please tell Her Honor and the ladies [387] and gentlemen of the jury what you identify each of them and, as you refer to them, I would ask you, sir, to refer to them by the identification number stamped on them.

* * *

A.* * * 20C is a list of names, telephone numbers, initials, and other numbers which were identified with telephone numbers, which were found in the bottom of this shoe box underneath these tablets.

* * *

[389] MR. COLEMAN: Exhibits 20A, B, C, D, E and F.

THE COURT: Admitted.

(Government's Exhibits 20A, B, C, D, E and F for identification were admitted into evidence.)

* * *

At the bench in a low monotone:

MR. CAREY: Your Honor, I think I made the record clear yesterday, but I am asking you, in order to reassure myself, I want to object to any evidence offered by the Government which was secured as a result of this search warrant. We originally contended -- it wasn't heard by Your Honor -- it was heard by another member of the Bench. The Court held the warrant to be properly issued. In order to [390] protect the record, I'm objecting to any evidence being offered at this time. We want to do this rather than to be jumping up and down.

THE COURT: Your objection will go to all of that.

End of bench. Open Court.

* * *

[460] MR. CAREY: I wanted to get Your Honor's permission or lack of permission on this particular question. I would like to ask when this man was initially on the stand, in the statement which was prepared by the FBI agents, on the police books McMurray is quoted as having said that he went to the FBI on his own, and in essence he became an informer.

THE COURT: That he went to the FBI on his own?

MR. CAREY: No doubt in August or the latter part of July of 1962, because of the alleged gamblings out at Third Street, Northwest, where he was employed by the H & R Company.

In that statement he said he went to the FBI to inform on these defendants, three males, anyway, as to the gaming and gambling activities.

THE COURT: I do not remember anything like that.

MR. COLEMAN: This is going beyond the scope. It would be and was our agreement he would be called only for impeaching his testimony.

MR. CAREY: He said in the statement he gave to the FBI, he says he went to the FBI to report the gambling activities of these two or three male defendants. Now, a [461] search warrant was issued and it says this, and excuse me just a minute, Your Honor, please.

THE COURT: Yes.

MR. CAREY: On the search warrant, on page 2 of the recitation of what the agents said, in the second paragraph of page 1 says the following: Confidential informants have furnished information that Francis A. Simpson and his associates moved their place of gambling operation quite frequently in order to evade detection. They have been known to operate at 6214 Third Street, Washington, D. C.

According to the above reliable sources, the above-named individuals have from time to time been employed by Francis A. Simpson at one of the above addresses.

I think it is crucial to our case and I think the Courts are beginning to adopt this proposition. In an affidavit, when you ask who the informer is -- I do know at this particular time one of the informants -- an informer is Mr. Louis McMurray who was just on the stand. I say I should be allowed to ask him about his information. In fact, I did. He said this --

THE COURT: Now wait a minute. According to what you said, you said he testified that he told the FBI --

MR. CAREY: That is right.

THE COURT: -- and if he did, you had an opportunity to cross examine him.

[462] MR. CAREY: I did ask him. He said he went to the FBI.

THE COURT: Well, why do you now want to --

MR. CAREY: Because at this time I am asking the Court to take another look at the search warrant because the FBI agent under oath has asserted that reliable information from informant -- now I suggest that the Court, now knowing this man, knowing this man has a rather substantial record, I ask the Court to look into his credibility.

THE COURT: Now, Mr. Carey, I am not going to do that. Maybe we have had a lot of people who have some sort of record who have co-operated with the police. I don't know why they do it. Maybe they think certain offenses are all right according to their standards and others are not. But at any rate I do not think the fact this man has a record would mean he would be unreliable. He might be.

MR. CAREY: I would think, and I may be wrong because I can't speculate how the judicial mind would operate, but initially, when I had a motion to suppress before Judge Curran, I did not know who the informant was.

Now, in the course of this trial I have learned who this informant was and I think, had Judge Curran known who the informer was, and with his record, I think we might have had another ruling.

THE COURT: And as I have said, we have had people [463] who had records who were informants.

MR. CAREY: Some of the nicest people around.

End of bench. Open Court:

* * *

[555] MR. CAREY: May it please the Court, I would like to renew all the motions heretofore, Your Honor.

This is a motion for judgment of acquittal.

(The argument on the motion is omitted from this transcript.)

THE COURT: I will deny your motion, Mr. Carey, both the motion for judgment of acquittal and also the motion for exclusion of evidence.

* * *

[2] Excerpt from Closing Argument by Defendants

* * *

MR. CAREY. . .

And here is an interesting aspect I'd like to discuss with you, if I may. 20-C, list of names. Remember he says usually the gamblers have names like -- is it Half-Foot or White-Foot? Remember he talked about: You have names on cards, you identify them in that fashion.

We have Loretto, SO 5-6028. Johnny, 546-6814. Margaret, 234-6889.

I can't read them all, it would be too boring, I don't want to bore you. Hough, I hope it is not Sam, 546-9614. Steve, LI-48765. Sharlene, KI 8-3073. And Dot, TE 6-6824.

Well, you have, I would estimate, probably twenty-five to thirty names on that card and you know as well as I, the FBI, I am sure, has talked to everybody named or everyone listed on that card and if they could establish that any of these names were used as gamblers or had bet with these people, this courtroom wouldn't be big enough, we'd have to open all the doors to let a third of them in at one time.

Here you have all these names, every one of them, and their telephone numbers listed, and an amateur sleuth such as you and I could run that down, and they don't have any of these people here at all.

If this was used for gambling purposes, I say what [3] happened to the great FBI that it didn't bring any of these people in here to testify and say: Yes, we did place bets with these four people. I leave that to your conjecture, ladies and gentlemen.

And here is another one, 20-D. Bob Nolan, TE 6-3277. Charlie, TE. Temple. Lena. Henry. Margaret. Loretto. Where are these people? -- if these people were involved in a numbers racket with this particular crowd.

And this one here, it's a football ticket. This isn't a numbers ticket. This is a football ticket. So what? So what?

* * *

Excerpt from Closing Argument by Government

[613] Another technique is to talk about evidence that isn't here. Talk about these telephone lists that were found and, oh, they read a lot of names off these; you know, we were pretty luck to find these, they were in the bottom of that shoe box. Do you remember the FBI man, Mr. Miller, with the thirty years' experience in gambling? He said you will find phone numbers around, perhaps of writers, they might be first names, last names, maybe different names than they actually

have, they may be code names. Well, when the defense was reading out this list, let me tell you some things they didn't read off the list: X-29. How many of you have phone numbers in your pocket that have X-29 on it? 28-A. How many of you identify people as 28-A? HO-6, HO-5, HO-4, and those aren't exchanges, the exchanges are next to them. Doesn't that fit into the picture?

Oh, we were told why weren't those people brought in? Why weren't they here on the stand? Well, they gave their own [614] answer. That wasn't found, that list wasn't found until the day that the FBI agents made the arrest. If you went to those people now -- there aren't wire taps around to prove what went on between those phones -- if they say: I am not saying anything, or I am taking the Fifth Amendment, what can you do? It's not like Richardson --

MR. CAREY: I am going to object, there is no evidence before this jury that these named people took the Fifth Amendment or what have you. We have no evidence whatsoever. He should not be allowed to argue that to the jury.

MR. COLEMAN: This is a subject that has been opened up by the defense, they opened it up now before we could rebut it with evidence during the case and then they complain because we answer it.

MR. CAREY: I didn't put that into evidence, Your Honor. That was put in by the government.

MR. COLEMAN: It was argued, it was argued.

MR. CAREY: I asked where are these people, and they are not here.

THE COURT: Now, just a minute, gentlemen. You did comment, Mr. Carey, upon the fact that these numbers were here and then you did inquire as to where these people were. Now, he has a right to make comments in response to your argument.

MR. CAREY: Your Honor, I don't object to that. But I say that he can't say these people might have taken the Fifth [615] Amendment, there is no evidence of that being in this case, it is sheer speculation.

MR. COLEMAN: Mr. Carey made sheer speculation, Your Honor, himself and I think I should be entitled to answer it. I don't think it should be a one way street.

THE COURT: You may proceed.

MR. COLEMAN: Thank you, Your Honor.

Court's Instructions to the Jury

* * *

[624] You are the judges of the facts, you are the fact-finding body of the Court. You are to decide for yourselves what the facts are and after you have done that, you are then to apply to those facts the law as I shall state it to you, and then you are to deliberate and reach proper verdicts.

In deciding what the facts are, you are to look solely to the evidence in the case. The evidence in the case consists of the testimony which you have heard from the lips of the witnesses who took the stand here before you; and also you may consider as evidence in the case the exhibits and those inferences which to your mind logically and reasonably arise from the testimony in the case.

What the lawyers say to you is not evidence in the case and what I have said to you, and shall say to you, is not evidence in the case. The evidence is just what I indicated to you a moment ago. If the attorneys, in their arguments to [625] you, have said something is in the evidence which according to your recollection is not there, then you are to go by your own independent recollection, And if, in the course of this charge, I state that something is in the evidence which according to your recollection is not there, then again you are to be guided by your own recollection.

* * *

You are not only the judges of the facts in this case, but you are the judges of the credibility of each and [626] every witness who appeared here before you. That means that you are to decide what witnesses to believe and the extent to which you believe them.

In deciding the credit or weight you will give to the testimony of a witness, you may take into consideration the appearance and demeanor of the witness on the witness stand, whether the witness impressed you as having an accurate memory and recollection, whether the witness impressed you as a truth-telling individual or the contrary; that is simply another way of doing what all of us do in ordinary life. You may consider whether the witness looked and acted as if he or she were telling truthfully, frankly and honestly, what the witness knew to be so, or the contrary. You may consider the opportunity or lack of opportunity of a witness to know the facts about which the witness testified. You may consider the reasonableness or unreasonableness of the testimony of a witness, its probability or improbability, in deciding what weight you will give to it. You may consider the contradictions, if any, in the testimony of a witness. You may take into consideration the frankness or lack of frankness of a witness.

In judging the evidence and in determining the credibility of witnesses, it is the truth which you must seek. Bring to your task your knowledge of human nature and your ability to judge men and women, their intelligence, their [627] motives and their intentions.

If you believe that any witness wilfully testified falsely, as to any material matter about which the witness could not reasonably have been mistaken, then you are at liberty to disregard the whole of the testimony of that witness or such part of it as you believe to be untrustworthy. The law leaves to your good, sound judgment the findings of the facts as well as the determining of the credit and weight you will give to the testimony of each witness who appeared here.

I shall now refer to certain witnesses who testified. One was Mr. Richardson. It was brought out that, some years ago, he was convicted of an offense known as taking property without right. You will recall also that Mr. McMurray was a witness and it was brought out that he had been convicted of the offense of petit larceny. I believe that there were two such convictions and there may have been something else, you may depend upon your own recollection in that regard.

Now, you are told this: Whenever a person takes the stand as a witness in court, that person may be asked about criminal offenses of which he or she has been convicted. The only purpose of allowing such testimony is that a jury may have that information in connection with its consideration of the credibility of such a person as a witness; in other words, it is one factor that you would take into consideration, [628] along with all the other factors which I mentioned, such as the demeanor and appearance of a witness on the witness stand and how the witness impressed you, but a witness who has a criminal record, like any other witness, may be believed by you, if you believe that the witness is telling the truth.

* * *

There were, as you know, certain charts admitted in [629] evidence. Any summaries or charts admitted into evidence are competent for the purpose of explaining facts disclosed by other evidence. However, such charts and summaries are not, in and of themselves, evidence of proof of any facts. So, if you should find that such charts or summaries do not reflect facts and figures shown by the other evidence in the case, you must disregard them. That is to say, such charts or summaries are used only as a matter of convenience and, unless you find that they are in truth summaries of facts and figures shown by the evidence in the case, you are to disregard them.

Now, it is my recollection that when Mr. Richardson testified, he said that in the latter part of July, 1962, when he was renting a basement at premises 6214 3d Street, N. W., that he knowingly rented space in that basement for a numbers operation which, so he said, was carried on there by the men defendants.

You are told that anyone who, knowingly and voluntarily, cooperates with, aids, assists, advises or encourages another in the commission of a crime, is what is called an accomplice. If Mr. Richardson did knowingly rent space in the basement for a numbers operation and did permit it to go forward there, then according to his testimony he would be an accomplice.

It is the settled rule in this country that an accomplice is a competent witness and the government has the [630] right to use an accomplice as a witness. It is the duty of the Court to admit the testimony of an accomplice and that of the jury to consider it. However, it should be received by the jury with caution and scrutinized with care. After you have received it with caution and scrutinized it with care, you may then give it such weight as you believe it is entitled to receive. The degree of credit which you may give to such testimony is a matter exclusively within your judgment. You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, if you believe the accomplice. But you should do so only after you have carefully and cautiously scrutinized such testimony.

It is the contention of Mr. Carey, I believe, that Mrs. Shirley, Mr. Shirley and Mr. McMurray are also to be deemed as accomplices; on the other hand, the position of the government is that they are not accomplices. According to my recollection, Mrs. Shirley testified that she rented the basement at 1452 Ogden Street for an office, I believe she said a subcontracting business. There is, so far as I recall, no evidence that she or Mr. Shirley knowingly permitted the use of the basement for any unlawful operation. If you find that is the case, then you would not regard the testimony of Mr. and Mrs. Shirley as the testimony of accomplices. I repeat, you would not regard their testimony as the testimony of accomplices.

[631] As to Mr. McMurray, his testimony, according to my recollection, was that he was employed by Mr. Richardson in a business Mr. Richardson was carrying on in a basement on 3d Street; that he saw the three male defendants there, but had nothing to do with their operation; that he never accepted any telephone calls for them and took no numbers bets for them. It is also my recollection that he testified that he was present when, at night, certain telephones were installed, his pre-

sence being directed by Mr. Richardson, but that he did not order the installation of the phones or assist in their installation. Under these circumstances, his testimony would not be that of an accomplice. He did say that on the telephone, twice, I believe, he did place a bet with the male defendants, but that circumstance would not make him an accomplice.

* * *

[645] The charge in count four has been made under Section 1502 of Title 22 of the District of Columbia Code. This section reads in pertinent part:

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper or writing, current or not current, used or to be used in a lottery known as the numbers game, he shall be punished as the law provides.

The essential elements of the crime charged in count four, as to each defendant, are as follows:

> First, that the defendant, on or about October 15, 1962, within the District of Columbia, had in his possession or under his control, a notation or [646] record or receipt or ticket or certificate or bill or slip or token or paper or writing, either current or not current, which had been or was to be used in a lottery known as the numbers game.
>
> Second, that said defendant did so knowingly.

As I have indicated, count four has been drawn under Section 1502 of Title 22 of the District of Columbia Code and charges the four defendants with knowingly having in their possession and under their control, papers used or to be used in a lottery known as the numbers game. The government maintains that its Exhibit 11-C is such a paper. In this connection, you are told that the law provides that for the propose of Section 1502, possession of a paper used or to be used in violating the law against lotteries shall be presumed to be knowing possession thereof.

You are told that the law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more [647] persons have actual or constructive possession of a thing, then their possession is joint.

If you find from the evidence beyond a reasonable doubt that a defendant charged under count four, either alone or jointly with others, had actual or constructive possession of a paper, used or to be used in a lottery known as the numbers game, then you may find such paper was in the possession of such defendant within the meaning of the word possession as used in these instructions.

* * *

[666] (At the bench:)

THE COURT: Have you any objections or requests, any of you? Gentlemen, this thing has been awfully long, all this conspiracy takes a lot of time.

* * *

[669] MR. CAREY: You said, when you were giving the instruction about accomplices -- I am speaking lower -- you said they were not accomplices. I say it should be left to the jury as to whether these people are accomplices or not.

THE COURT: The only trouble about it was, there wasn't any evidence.

MR. CAREY: That is where we honorable men differ, Your Honor, I say it should be left to the jury and it is not a legal determination. I think they should be told: And if you believe the evidence, then you can construe it to be they are accomplices. Absent that, I say no, I think that is wrong. I make my objection.

* * *

[670] THE COURT: One thing I would like to mention about this accomplice thing, I have had cases where the evidence was such that, according to what way you took it, this might be and this mightn't be, and I have submitted it to the jury. But there wasn't any evidence here to submit to them except what they said.

* * *

[672] (At 3:55 p.m., the jury retired to begin its deliberations.)

THE COURT: Now, if you all would like to leave your telephone numbers where you may be reached, the clerk will notify you as soon as you are needed. How long do you all want me to keep this jury today?

MR. CAREY: Hope springs eternal, I was hoping that you would release them until tomorrow morning, but apparently you have other ideas, Your Honor. It is 4 o'clock, I have got a long motion before Judge Holtzoff tomorrow morning, I have got to get ready for it.

THE COURT: I will tell you, I think I will keep them until 5 o'clock and then if I don't hear from them, I will call them in and let them go until tomorrow morning.

MR. COLEMAN: That will be satisfactory to the government, Your Honor.

THE COURT: All right. So you all are excused now.

(Court was recessed awaiting the return of the jury.)

\- - -

(At 5 p. m., the following proceedings were had:)

THE COURT: Bring the jury in.

(The jury entered the courtroom.)

THE COURT: Members of the Jury, you all have had a long day and I thought that if you have no verdict, as I assume you have not as yet, that I would let you go for today.

[673] You haven't reached any verdict as yet?

THE FOREMAN: No, we have not, Your Honor.

THE COURT: Well, you are going to be allowed to go home now and to return tomorrow morning at the usual time and resume your deliberations in the jury room.

* * *

[683] (The jury entered the courtroom.)

THE COURT: Good morning, members of the jury, I am sorry that there has been the delay in sending to you the exhibits that you requested. The reason that they have not [684] been sent earlier is that court has been going on here and I found it difficult to have the clerk perform his duties here and at the same time try to get together these documents for you, so please excuse the delay.

Now, members of the jury, there is one thing I desire to call to your attention. There was admitted during the trial an exhibit, which the government offered, called 14-B. This exhibit was not passed to the jury. This exhibit was a paper which one witness testified, I believe, was found with some money and the testimony was that certain fingerprints were on this document.

Now, I am going to let you have this document, but I must tell you that this paper, on which the witness said these fingerprints were found, has some writing on it and it is not appropriate for the jury to read this writing, it doesn't concern this case and you are not to read it.

Now, in order that you may not read it inadvertently, I have taken the precaution of having some paper stapled over that writing. So this is permitted to go to you for the purpose of your looking at the back and for the purpose of your looking for these prints over here on the side, but you are not to read the writing under this stapled paper.

* * *

[686] (The Court reconvened at 5:10)

THE COURT: I have heard nothing from this jury, so I thought I would let them go until Monday. Do you all have any ideas about that?

MR. CAREY: I should like to address the Court, if I may?

THE COURT: All right, you may.

MR. CAREY: May I respectfully object to this jury now being continued after this afternoon. I premise my objection on this proposition. I think it was a six day trial and they had an hour and fifteen minutes or an hour and a half yesterday to deliberate. They have been at it since 10:00 o'clock this morning and I think any further concentration on the part of the jury would be prejudice. And I respectfully register a protest.

MR. COLEMAN: May I be heard, Your Honor?

THE COURT: Yes.

MR. COLEMAN: I want to set the record straight. I believe the jury only deliberated from about 4:10 to 5:05 yesterday. It was less than an hour. This morning they asked for exhibits and it was a long time before they got them. They really didn't get them until about 11:30 or a quarter till 12:00. So I don't think in view of the length of time of the trial that they have been deliberating an excessive length of time.

MR. CAREY: I do not think there is any need for any disparity as to when the jury went out. The clerk would have the time.

[687] THE DEPUTY CLERK: 4:10 P.M.

THE COURT: 4:10 P.M. he says. They left here yesterday at 5:00 o'clock so that was fifty minutes and they sent this request in here today for the exhibits. The clerk was busy with the cases going on -- the motions going on -- so we were not able to stop to get the exhibits. And then when we did have a chance to get them you were not available. We had to wait for you. So it was not until, as Mr. Coleman said, about 11:30 that they got those exhibits.

At 12:30 I had them taken to lunch and they got back at 1:45. So they have not been deliberating very long. They have not sent any notes that they are unable to agree. Therefore, I think under the circumstances they should continue. The only thought I had was whether I should have them come back tomorrow or let them go until Monday?

MR. CAREY: My objection is a matter of record. If the Court is going to bring them back I would prefer Monday.

THE COURT: Very well. I believe that would be better.

MR. CAREY: Your Honor, I think you said I wasn't available. I think the record should reflect that I was before Judge Holtzoff and I couldn't get here.

THE COURT: Oh, certainly. I did not mean anything derogatory. I knew you were before Judge Holtzoff.

* * *

[688] (The jury returned to the courtroom at 5:15 P.M., October 16, 1964).

THE COURT: Members of the jury I take it that you have not as yet completed your deliberations and so I thought I would let you go for today. It is true that you have not completed your deliberations, Mr. Foreman, is it not?

THE FOREMAN: It is.

THE COURT: While you are in recess you are not to discuss this case with anyone. And the foreman is charged with the responsibility of seeing to it that there is no discussion of the case in the juryroom until all 12 jurors are assembled there on Monday morning at 10:00 o'clock.

[689] Now I would like for the foreman, after you leave the courtroom today, to deliver to the Clerk all of the exhibits which you have and if any of you have written, have anything written on the papers which were delivered to you, then I will have the marshall obtain an envelope in which you may put them and seal them.

Are there any of you who have written anything on your papers? All of you have something on the papers. Then will you prepare the envelopes? You are to put your papers in the envelopes, seal them, and put your name on it. Do all of you have a pen with which to write? Mr. Marshal, pass this pen along, please.

Are those the extra envelopes you did not need?

THE DEPUTY MARSHAL: Yes, ma'am.

THE COURT: All right. Mr. Marshal, as you take them up be sure that the names are on them. Have you counted them and do you have twelve?

THE DEPUTY MARSHAL: 12, Your Honor.

THE COURT: Deliver them to the Clerk, please.

Members of the jury, as I told you yesterday, we now have no alternate juror so I hope that all of you will be here promptly on Monday. Please keep in mind the admonition that I gave you. You may now go.

(The jury withdrew from the court room at 5:19 p.m.)

THE DEPUTY MARSHAL: The Clerk has the exhibits.

THE COURT: Very well. Thank you. (Whereupon the Court recessed until 10:00 o'clock Monday morning.)

[690] October 19, 1964

(At 5 p.m., the following proceedings were had:)

THE COURT: Bring the jury in.

I haven't heard anything from them.

(The jury entered the courtroom.)

THE COURT: Mr. Foreman and members of the jury, it is now 5 o'clock, so I thought that I would let you go for today. You have not as yet reached your verdict, I take it?

THE FOREMAN: No, we have not, Your Honor.

THE COURT: Well, then, you are directed, Mr. Foreman, to see to it that tomorrow morning there is no consideration of this case until all twelve of the jurors are there. In the meantime, you are not to discuss the case until all twelve of you are there tomorrow morning.

Do you have the exhibits that you would like to turn over to the clerk?

THE FOREMAN: We left them in the jury room, Your Honor.

THE COURT: Do you have papers that you would like to have sealed up and left with the clerk?

THE FOREMAN: Yes, we have the same thing.

THE COURT: Then I will direct the Marshal to go with you and he will take those papers, they will be in an envelope -- the envelopes that you have, have already been undone, haven't they? Here is some Scotch tape, Mr. Marshal, [691] suppose you put some Scotch tape on the back of the sealed envelopes and then count them and see if there are twelve and bring the twelve in here to the clerk. And, Mr. Foreman, you bring the exhibits to the clerk.

You may now go.

(The jury left the courtroom.)

(The exhibits and envelopes were returned to the clerk.)

THE COURT: Mr. Marshal, will you tell them to return at the usual time tomorrow morning.

THE CLERK: There are twelve, Your Honor.

THE COURT: All right.

MR. CAREY: Your Honor, may I be heard for just a second?

THE COURT: Yes, what is it?

MR. CAREY: Your Honor, at this time I would like to make a motion for a mistrial. I think this jury has had ample to reach a verdict. They have been all day today, they were the great part of Friday, they got the case on late afternoon of Thursday, and I don't think the case is that complicated, I don't think the issues are that complex, and I think at this time the jury is being subjected to coercion and duress and I ask for a mistrial.

THE COURT: Well, I don't think that any conspiracy case is uncomplicated, so I will deny your motion. The jury [692] hasn't at any time told me they couldn't agree or that they wanted to go.

MR. CAREY: I was hoping Your Honor would ask if they were hopelessly deadlocked in order that the record would reflect what verdict they had, if any, at this time.

THE COURT: Juries are not timid about telling you they are deadlocked, if they are.

* * *

[694] PROCEEDINGS:

THE DEPUTY CLERK: The case of Francis A. Simpson, Jr., et al. Mr. Coleman, Mr. Joyce, and Mr. Carey.

THE COURT: I would like to tell you that I have a note from the jury which I received within the last ten minutes. The note says:

Your Honor, the jury is hopelessly deadlocked.

Thanks. The Foreman.

I am going to call them in and give them the Allen Charge.

MR. CAREY: May I be heard before you bring them in?

THE COURT: You may be heard right now.

MR. CAREY: May it please the Court, Your Honor the jury has had this case since 10 after 4:00 o'clock on Thursday of last week. They had deliberations on Friday. They had deliberations all day yesterday. They have had deliberations up until now which is now about 7 minutes past 11:00.

It seems to me that a case that took six days to try, the jury has had ample opportunity to come to a proper determination at this time. It has not done so. I would then suggest that inasmuch as the jury suggested to the Court it is hopelessly in disagreement, that a mistrial is just as much a part of the jury system as a verdict of guilty or a verdict of not guilty.

Because of the facts I think at this particular time to bring the jury in and to give them the Allen Charge is further coercion and duress on these jurors, and I respectfully [695] and strenuously suggest that we should have a mistrial at this particular time.

I think the recent case of Williams versus The United States, decided June 25, 1964, No. 18,406, and I think the courts are beginning to have a reappraisal of the Allen Charge because of the suggestion suggested by Judge Wright in that opinion. The Allen Charge is identified as the dynamite charge. I think it depends on how much tonnage is placed in the dynamite.

Those are excerpts taken from that opinion. Because of those factors and I would think because of the reappraisal - in fact, two circuits have looked with a great deal of criticism on the Allen Charge, and I think our Court of Appeals is doing the same thing.

THE COURT: Now Mr. Carey with all due respect to Judge Wright and these other circuits that you mentioned, the Supreme Court has approved of the Allen Charge, and hasn't disapproved it since.

MR. CAREY: But Your Honor, I would agree with you in some instances. But if a jury was out for a short period of time, I think then you might at that time the Allen Charge may have some efficacy but I don't make that concession. But in this particular matter, I think you have to look at this as a practical matter and in an objective fashion. The jury now having had this since last Thursday, I think it is unfair, if I may use the word, and I don't use it critically of the Court, to subject these four defendants -- they were here since Thursday afternoon. They spent all day Friday here, and I am sure that [696] on Saturday and Sunday this case was much apart of their lives, as it is today and yesterday.

And I think to keep these people hanging on as of yesterday and today, I don't think it is right. I think we should have a motion for a mistrial granted and I rest at that.

THE COURT: Do you want to say anything, Mr. Coleman?

MR. COLEMAN: Not on this subject, Your Honor. I would like to inquire of Your Honor whether Your Honor intends to inquire of the jurors whether they have reached a verdict as to any defendant on any count before Allenizing them?

THE COURT: All right, I will do that.

MR. CAREY: I want to object to any inquiry of the jury at this particular time.

* * *

[697] THE COURT: Mr. Marshal, will you bring the jury in and seat them in the box?

(The jury was brought into the court room at 11:12 A.M.)

[698] THE COURT: Good morning, members of the jury. I have a note from your foreman which reads as follows:

"Your Honor, the jury is hopelessly deadlocked.

Thanks. The Foreman."

At this time I desire to have the foreman answer for me a question. The question is to be answered only yes or no, and I shall state the question twice in order to be sure that you understand it.

Has the jury agreed as to any count or counts as to any defendant or defendants? That is the question. I will repeat it. Has the jury agreed as to any defendant or defendants as to any count or counts?

Mr. Foreman, did you understand the question?

THE FOREMAN: I do, m'am.

THE COURT: What is the answer?

THE FOREMAN: Yes.

* * *

[699] MR. COLEMAN: Your Honor, it is our position that we would like the partial verdict taken before the Allen charge is given on any counts.

THE COURT: All right, I am willing to do it that way.

MR. CAREY: I object Your Honor.

End of Bench. Open Court:

[700] THE COURT: Members of the jury, I note that you do not have with you the papers, that long paper on which you were to enter the verdicts. Now perhaps it would be well for you to have that paper before you as to the verdicts that you have agreed upon.

Do you all agree with that? Well then I think what I will do is to permit you to return to your jury room for the purpose of getting whatever papers you feel you need to announce your verdicts as to those counts, as to those defendants that you have agreed on. I think that you might do that now and then return. (The jury left the court room at 11:16.)

* * *

[701] THE COURT: All right, bring them in and I think maybe we better let them all sit down. (The jury returned to the court room at 11:20).

Mr. Foreman, will you rise, please? Now Mr. Foreman, you are to answer the questions which the clerk will put to you.

[702] Now listen carefully. If you feel that any question he puts to you you do not understand, then you may so state and I will have it asked again. Now Mr. Clerk.

THE DEPUTY CLERK: Mr. Foreman, as to the defendant, Francis A. Simpson, Jr., have you reached a verdict on any of the counts of the indictment in which Francis A. Simpson, Jr. is charged?

THE FOREMAN: Yes.

THE DEPUTY CLERK: On which counts have you found a verdict?

THE FOREMAN: Count 4.

THE DEPUTY CLERK: What say you as to the defendant, Francis A. Simpson, Jr. on count 4 of the indictment?

THE FOREMAN: Guilty.

THE COURT: Just a minute. Do I understand that you have not found a verdict as to Francis A. Simpson, Jr. as to any of the other counts?

THE FOREMAN: That is correct.

THE COURT: All right.

THE DEPUTY CLERK: Mr. Foreman, as to the defendant, James T. Skeens, have you reached a verdict on any of the counts in the indictment in which James T. Skeens is charged?

THE FOREMAN: Yes, sir.

THE DEPUTY CLERK: And on which count or counts have you found a verdict?

THE FOREMAN: Count 4.

[703] THE DEPUTY CLERK: Mr. Foreman, what say you as to the defendant, James T. Skeens of count 4 of the indictment?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Mr. Foreman, as to the defendant, John C. Renner, has the jury reached a verdict on any of the counts of the indictment in which John C. Renner is charged?

THE FOREMAN: Yes.

THE DEPUTY CLERK: Which count or counts is that, please?

THE FOREMAN: Count 4.

THE DEPUTY CLERK: Mr. Foreman, what say you as to the defendant, John C. Renner on count 4 of the indictment?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Mr. Foreman, as to the defendant, Fedora A. Flanagan, has the jury reached a verdict on any of the counts in the indictment in which Fedora A. Flanagan is charged?

THE FOREMAN: Yes.

THE DEPUTY CLERK: Which count or counts have you reached a verdict concerning Fedora A. Flanagan?

THE FOREMAN: Count 4.

THE DEPUTY CLERK: Mr. Foreman, what say you as to the defendant, Fedora A. Flanagan on count 4 of the indictment?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Members of the jury, your foreman [704] says that you find each of the defendants guilty on count 4 of the indictment, and that is your verdict as to count 4 of the indictment, so say you each and all, so help you God?

THE JURY: Yes.(In unison.)

THE COURT: You may be seated, Mr. Foreman.

* * *

[Government's Exhibit No. 20-C]

[List of names and telephone numbers found in bottom of shoe box in furnace room at 1452 Ogden St. N.W. Washington, D.C. 10/15/62]

Loretta	SO-5-6028
Johnny	546-6814
Margaret	234-6889
Danny	DE-2-7896--AD-4-1906
[illegible]	LI-7-5700 (ext. 2055) LI-6-7828
Donnie	LI-4-6067
Shop	OV-3-2630--OV-3-0340
O'Dell	TA-9-4349--LI-3-2312
Snake	LU-4-2985--SP-2-1378--RE-6-7421
Willie	KI-9-5523--TE-6-9734
Elanor	OV-3-1175 (a-1)
Earl	927-8236
Bill	462-5895
A. B.	TE-6-3038
Sonny Red	TA-9-6148
284	765-0720
Gib	TE-6-2895--OV-3-3300--KI-9-1142
Huff	546-9614
Bob	TE-6-3277
Ellis	TE-6-1423
Sleeper	TE-6-7946
Steve	LI-4-8765
X-29	JO-2-3966
Bobbie (Art)	RO-8-3078
26-A	234-9600--JA-7-3649
B.P.	KI-8-0677
Charlene	KI-8-3073
Freeman	LI-6-0258
HO-6	KI-9-4368 (Helen)
HO-5	548-6412 (Catherine)
HO-4	TE-6-9729 (Abbe)
[illegible]	TE-6-[illegible]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS D. SIMPSON, JR.,	No. 19,196	)
JAMES T. SKEENS,	No. 19,197	)
JOHN C. RENNER,	No. 19,198	)
FEDORA A. FLANAGAN,	No. 19,199	)

APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
For the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
RICHARD M. COLEMAN,
Assistant United States Attorneys.

EDWARD T. JOYCE,
Attorney, Department of Justice.

CAROL GARFIEL,
JOHN R. KRAMER,
Assistant United States Attorneys.

Cr. No. 314-63

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the Commissioner have a substantial basis for concluding that three of the appellants were conducting a numbers and gambling operation at certain premises where the affidavit sworn to by ten FBI agents contained not only hearsay information from sources who had proven reliable often in the past but also reasonable corroboration of the informants' statements derived from personal observations by the agents of the details of appellants' comings and goings and from the agents' knowledge of the previous records of appellants' involvement in illegal gambling activities and crimes stemming therefrom?

2) Was it reversible error for the prosecutor to respond to defense counsel's missing witness argument in the absence of any request for a missing witness instruction and in the presence of facts indicating that the allegedly missing witnesses were peculiarly available only to the defense as appellants' clientele, by suggesting that the jury consider some of the possible reasons why no witnesses appeared in place of cryptic first names, symbols, and phone numbers, including the reasonable refusal of gamblers to incriminate themselves in open court?

3) Were the trial court's instructions on accomplice testimony erroneous where the court transmitted to the jury this Court's approved definition of an accomplice and approved cautionary warning of the care with which such testimony should be scrutinized, while also telling the jury that, if the jury's recollection of their testimony was the same as the court's, as a matter of law, one witness who testified that he knowingly rented space to the operation was an accomplice, whereas another witness who testified that his only connection with the operation was phoning in personal bets on two occasions was not an accomplice?

4) Did the court properly exercise its discretion (a) to permit the jury to separate during its deliberations in the absence of objection or of any showing of prejudice and (b) to allow the jury to deliberate more than two days after a six-day trial involving four defendants and six counts (one charging multiple-level conspiracy), where the jury did not indicate a desire to cease deliberations?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS D. SIMPSON, JR.,	No. 19,196	)
JAMES T. SKEENS,	No. 19,197	)
JOHN C. RENNER,	No. 19,198	)
FEDORA A. FLANAGAN,	No. 19,199	)

APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
For the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were indicted, tried by jury, and convicted of possessing numbers slips in violation of 22 D.C. Code § 1502. They were acquitted on five other counts charging various interstate and local gambling violations under 18 U.S.C. §§ 371, 1952 and 22 D.C. Code §§ 1501, 1505. Appellants Renner, Simpson, and Skeens were sentenced to imprisonment for a period of one year each, while appellant Flanagan received a two-year term of probation.

The evidence relevant to the crime for which they were convicted revealed that, on October 15, 1962, eight FBI agents executed a search warrant for the premises of 1452 Ogden Street, Northwest, in the District, and arrest warrants for appellants Flanagan, Simpson and Skeens, all issued by United States Commissioner Wertleb on October 12 on the basis of a joint affidavit signed by ten special agents (J.A. 1-11). The agents proceeded to the premises, were admitted by the landlady, after identifying themselves, further announced their authority and purpose at the cellar door, and descended to the basement where they came upon a cinder block enclosure whose surface was broken only by a knobless, reinforced door made of wood encasing steel, steel-framed, bolted and triple-locked (Tr. 253-254, 276-277, 305, 338-339). Agent Battle knocked on the entrance to this walled fortress, repeated his announcement of authority and purpose three times, and obtaining no answer from within other than the sound of shuffling, scurrying, and moving of furniture, ordered the other agents to try to knock the door or wall down with the sledge hammers, crowbars, pry bars, and axes they had with them (Tr. 254-255, 277, 330-331).

While the door was being unsuccessfully broached and the block wall being slowly forced in, Agent Howe peered through a hole that had been knocked in the wall (Tr. 255, 330-331). He saw all four appellants in a smoke-filled, disarrayed room. The three male appellants were picking up papers and things and carrying them to an inner room. (Tr. 332-333.) Agent Pennypacker was also able to see into the room through an opening for pipes at the top of the cinder wall. He saw smoke coming out and the glowing light of a fire and, stepping up on a bench to look between the pipes, further observed appellant Skeens placing paper objects in the oil burner in the inner room and making trips for more paper items to feed the fire. He called out to the other agents that appellants were burning the "stuff." (Tr. 369-373.)

When the door was finally opened, Agent Battle rushed into the back room and plunged his hand into the burner fire to save some of the papers within (Tr. 256). One of the remnants he and Agent Howe, who switched off the furnace, were able to save from the flames—Government Exhibit No. 11C—was turned over to Agent Pennypacker who took it to the FBI laboratory where Agent Miller, an expert of thirty years' standing on gambling operations and gambling documents, examined it and identified it as a run-down or lay-off sheet used to list the contingent liabilities of a numbers establishment after two numbers have been announced, but before the third and last number has been determined (Tr. 258-259, 271-272, 316, 335-337, 349-354, 463-476). Other gambling paraphernalia and instrumentalities located in the fortified headquarters included four telephone sets, an adding machine and the tapes to go with it, and lists of names and telephone numbers (Tr. 375, 377, 387-388).

STATUTE AND RULE INVOLVED

Title 22 D.C. Code, Section 1502, provides:

> If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Rule 41(c), FED. R. CRIM. P., provides in pertinent part:

> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or com-

missioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . .

SUMMARY OF ARGUMENT

I

The search warrant was valid since the affidavit submitted by ten FBI agents swearing to their belief that three of the appellants were conducting a numbers and gambling operation at certain premises provided the Commissioner with a substantial basis for his discretionary conclusion that probable cause existed for the issuance of the warrant. The affidavit recited hearsay information obtained from sources who had been reliable many times before and underlying circumstances verifying that information on the basis of the affiant agents' personal observations of the details of appellants' comings and goings with respect to their business premises and of the agents' knowledge of the prior records of appellants which revealed their involvement in various illegal activities connected with gambling, including acts of violence to collect gambling debts.

II

In his closing argument, defense counsel, having failed to request the court to give a missing witness instruction and in the face of facts revealing that the allegedly missing witnesses were customers of his clients and thus peculiarly available only to the defense, suggested that the jury consider why cryptic names, symbols, and phone numbers found in his clients' place of business had not been metamorphosed into living witnesses against his clients when, according to the unsworn testimony of

counsel, he knew that the FBI had interviewed them all. The prosecutor properly responded to this argument by pointing out to the jury possible explanations for the absence of testimony by gamblers against the people with whom they placed bets and played numbers, including their natural unwillingness to incriminate themselves in open court.

III

The trial court quite properly informed the jury of the definition of an accomplice used by this Circuit and instructed them, in accordance with the law of this Circuit, about the caution and care they should bring to their scrutiny of accomplice testimony. The trial court correctly told the jury that, as a matter of law, if the jury's recollection of testimony coincided with hers, the witness who said he knowingly rented part of his premises for a numbers operation was an accomplice, but the witness who claimed, without dispute, that he had nothing to do with the operation, although he made two losing bets with appellants over the telephone, was not an accomplice. A consumer of crime produced by others whose only aid to the enterprise is his financial loss and failure to report it to the authorities is not an accomplice of the producers themselves. The courts have always held that a person who occasionally gambles cannot be considered an accomplice of those who run and maintain the gambling establishment.

IV

After six trial days, in a case involving four defendants and six counts, including a multiple-level conspiracy count, the jurors deliberated two days and about two hours before reporting that they found all defendants guilty on one count and that they could not agree on the remaining counts. The overwhelming weight of authority in the federal courts, including decisions of the Supreme Court and this Court, is that the question whether to

sequester a jury during trial rests in the sound discretion of the trial judge. In this case, in the absence of objection and of any showing of prejudice, the trial court properly exercised her discretion to permit the jury to separate overnight.

Clearly the trial judge properly allowed the jury to deliberate until it announced it could agree no farther. In a complex case such as this it is frivolous to urge that the judge abused her discretion by not discharging the jury when there had been no intimation that the jurors were not conscientiously and freely engaged in their duties of determining appellants' guilt or innocence.

ARGUMENT

I. The search warrant was valid.

(J.A. 1-11)

Ten special agents of the FBI present the United States Commissioner with a sworn affidavit requesting a search warrant for certain premises and arrest warrants for three persons who, the agents firmly believe, are conducting a numbers and gambling operation from that address. The agents' belief is based both upon hearsay sources and their own personal observations. The hearsay derives from confidential informants who, according to the agents, have proven to be reliable on numerous occasions in the past. The informants claim that a particular man is currently processing his numbers work and receiving bets at the address in question, although he moves his operations around quite frequently to evade the police and has worked out of another specified address in the past. Nor is he alone in this enterprise. The informants indicate that another man and a woman have from time to time been associated with him at the two addresses mentioned.

The agents, as the affidavit reveals, attempt to verify this hearsay information. They discover that the head man was arrested in the vicinity some seven years before

for gambling violations, that the woman was picked up the year before for transgressing the lottery laws, and that the second man has a criminal past, including, *inter alia*, a serious assault with a pistol conviction predicated upon his violent efforts to collect a gambling debt with his subsequent parole revoked because he had worked and associated with known gamblers, an investigatory arrest five years before revolving around possession of gambling equipment, and an arrest but several months past for tampering with a slot machine. Some four months before he had been accused by a fully identified man just released from the hospital of having the man beaten up and joining in the beating because he felt that the man had "welched" on a baseball bet.

The agents further undertake to stake out, over a two month period, the addresses given them by the informants. The agents are thus able personally to observe the two men departing from the enterprise's old address on two different dates in the company of a third man, who had been arrested for tampering with a slot machine on the very same day as the second man and who had been named as one of the second man's helpers in the recent poolroom assault on a bettor who refused to pay up. Slightly over a month later, the agents who have the new business site under surveillance see all three persons—the two men and the woman—come on nine successive weekdays, Monday through Friday and the following Monday through Thursday, at anywhere from 10:51 a.m. to 1:17 p.m., but usually between eleven o'clock and noon, and depart after six.

Must the Commissioner refuse to issue the requested warrants when confronted with such an affidavit or be rebuked for abusing his discretion if he decides to issue them? See *Irby* v. *United States*, 114 U.S. App. D.C. 246, 248, 314 F.2d 251, 253, *cert. denied*, 374 U.S. 842 (1963). Appellants think so. Must a court reviewing his conduct in these circumstances necessarily find that he had no substantial basis for concluding that the three

individuals were probably conducting a numbers and gambling operation at the specified address? See *Jones* v. *United States*, 362 U.S. 257, 271 (1960); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964); *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964). Appellants think so. But neither the Supreme Court nor this Court has ever held invalid a magistrate's determination that probable cause existed to issue a search warrant where the affidavit presented hearsay information along with a substantial basis for crediting that hearsay as well as direct personal observations of the affiants. *United States* v. *Ventresca*, 33 U.S.L. WEEK 4193 (U.S. March 1, 1965) (observations of fellow officers of affiant—warrant valid); *Aguilar*, *supra* (only hearsay without any underlying circumstances revealing the source of the informant's conclusions or the reason for the affiant's conclusion that the informant was credible or his information reliable—warrant invalid); *Rugendorf*, *supra* (hearsay whose reliability was supported by singular nature of stolen property and characterization of petitioner's brother as a fence by another informant—warrant valid); *Jones*, *supra* (hearsay from allegedly previously reliable informant corroborated by other informants and affiant's knowledge of petitioner's use of drugs—warrant valid); *White* v. *United States*, No. 18,171, decided April 15, 1965 (hearsay from reliable source couplied with affiant's knowledge of appellant's record and personal observations of affiant of comings and goings of addicts—warrant valid); *Myles* v. *United States*, No. 18,176, *aff'd by order*, November 3, 1964 (hearsay from reliable source supported by affiant's personal observations of comings and goings—warrant valid); *Walker* v. *United States*, 117 U.S. App. D.C. 151, 327 F.2d 597, *rehearing en banc denied*, 117 U.S. App. D.C. 154, 327 F.2d 600 (1963), *cert. denied*, 377 U.S. 956 (1964) (hearsay from two previously reliable sources and third informant who identified appellants coupled with affiant's observations of comings and goings of addicts—warrant valid); *Irby*, *supra*,

(hearsay from informant corroborated by affiant's observations of gathering of known drug users and peddlers and knowledge that appellant was convicted drug trafficker—warrant valid); *Minovitz* v. *United States*, 112 U.S. App. D.C. 21, 298 F.2d 682 (1962) (hearsay from reliable source buttressed by affiant's personal observations of comings and goings—warrant valid); *Ward* v. *United States*, 108 U.S. App. D.C. 282, 281 F.2d 917, *cert. denied*, 365 U.S. 837 (1960) (hearsay from reliable sources supported by affiant's observations of comings and goings of known peddlers and users—warrant valid); *Brandon* v. *United States*, 106 U.S. App. D.C. 118, 270 F.2d 311 (1959) (hearsay from a reliable informant many of the details of which were personally verified by affiant coupled with presence of known narcotics trafficker—warrant valid). *Cf. Draper* v. *United States*, 358 U.S. 307 (1959) (warrantless arrest valid where details of reliable informant's description of appellant, his clothing, and his whereabouts personally verified by affiant).

The information in the affidavit in this case clearly provided the Commissioner with a sufficient factual foundation upon which he could exercise his detached, discretionary judgment whether or not to issue the search and arrest warrants. Not only did the affidavit divulge the information transmitted to the affiants by informants who had proven reliable many times in the past, but it also set forth some of the underlying circumstances demonstrating the reliability of the particular information given. Appellant Simpson was stated to be associated in his gambling business with appellants Skeens and Flanagan and operating out of both 6214 Third Street, Northwest and 1452 Ogden Street, Northwest. The agents observed Skeens and Simpson at the first address on several occasions, then, over a month later, saw all three at the second address on nine consecutive weekdays. The address change was reliably predicted by the informants. The sudden move fitted, as the experienced Commissioner was well aware, the evade-detection pat-

tern of conduct of gamblers. See *Myles*, *supra*. The Commissioner further knew from his handling of gambling affidavits in the past, *e.g.*, the warrant in *Minovitz*, *supra*, that the times of the weekdays all of the appellants habitually entered and left gambling headquarters, *i.e.*, between eleven o'clock and noon and after six p.m., precisely coincided with the unusual working hours of a numbers operation based on the pari-mutuel totals at a race track. ". . . [T]he Commissioner, as any magistrate experienced in these matters, is entitled to draw inferences from acts which to the uninitiated and unskilled would be innocent acts." *Irby*, *supra*, 114 U.S. App. D.C. at 249, 314 F.2d at 254. Finally, in addition to the verification of the hearsay by the affiant agents' personal observations, there was corroboration from the affiants' knowledge of the highly relevant previous records of the appellants, all of whom had been involved in gambling violations in the Washington area. Indeed, Skeens in conjunction with Renner had been arrested on May 30, 1962 for tampering with a slot machine and, on June 15, 1962, had participated in, if not sponsored, the gang beating of a bet "welcher" in a local poolroom.

Here, as in *United States* v. *Ventresca*, *supra*, the underlying circumstances upon which the affiants' belief was based were recited in copious detail, reasons for crediting the sources of the information were fully elaborated, and the magistrate found probable cause. Given this concatenation of conditions, this Court, as the Supreme Court warned in *United States* v. *Ventresca*, *supra*, 33 U.S. L. WEEK at 4195,

> "should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Jones* v. *United States*, *supra*, at 270.

Like the Supreme Court, this Court should be

> "equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires. They obtained a warrant from a judicial officer 'upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the . . . things to be seized.' It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and the rights of the community." *United States* v. *Ventresca*, *supra*, 33 U.S.L. WEEK at 4196.

II. The prosecutor's closing argument was proper.

(Tr. 613-615; J.A. 3-31)

In his closing agument, appellants' counsel made much of his clients' cryptic list of the phone numbers of some of their gambling customers. He picked up the list, introduced into evidence as Government's Exhibit No. 20C, and informed the jury that both he, as an unsworn witness, and they knew that the FBI had talked to everyone named on the card (J.A. 31). He stated that if the FBI had been able to determine that the first names on the list represented gamblers or bettors who had dealt with his clients, he could assure the jury that the courtroom would have overflown with witnesses against the appellants. Why weren't the people in court to say they had placed bets with appellants? He left the answer to that big question to the jury's imagination, aided and abetted by his insinuation that their absence proved that the list had nothing to do with gamblers and his implication that the Government was lying and attempting to mislead the jury when it contended that the list was related to gambling.

The defense had not sought a missing witness instruction from the trial court with respect to the abbreviated names and telephone numbers nor could it successfully have done so in light of the greater availability to the defense of its own clientele. Instead, the defense employed what this Court has recognized once before as the "carefully calculated defense tactic *not* to ask for such an instruction in a close case thus leaving the defense free to press upon the jury the prosecution's failure to call an alleged 'missing witness.'" *Trent* v. *United States*, 109 U.S. App. D.C. 152, 156, 284 F.2d 286, 290 (1960), *cert. denied*, 365 U.S. 889 (1961).

Replying to this missing witnesses (such as X-29, 26-A, and HO-6) argument, the prosecutor properly answered the defense's factual assertion that the witnesses had not testified because the FBI had actually interviewed all of them and discovered that they had no knowledge whatever of any gambling operations by offering the jury various possible explanations of their non-appearance at trial consistent with their being numbers players. The prosecutor suggested that if the jury went to the people now to find out why their phone numbers were in appellants' possession, it would be only too natural for them either to refuse to say anything and get involved or assert their rights against self-incrimination vis-a-vis the placing of bets, see 22 D.C. Code § 1508, an absolute bar to calling them as Government witnesses. Reference to the Fifth Amendment as a logical reason for the witnesses' absence was consistent with the Government's claim, supported by expert proof, that the list was maintained for gambling purposes and expressed a fair and just view of the Government's duty with respect to potential defendants. Viewed in appropriate context, the argument is a proper rebuttal affirmatively invited by the defense approach to the missing witness problem, and provides no basis for reversal of appellants' conviction. See *Lawn* v. *United States*, 355 U.S. 339, 360 (1958) (prosecutor's assertion of belief in truth of witness' testi-

mony held proper retaliation to defense attack); *Del Cristo* v. *United States*, 327 F.2d 208 (5th Cir. 1964) (proper responsive argument that prosecutor believed defendant guilty); *Homan* v. *United States*, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960) (prosecutor's statement that defense counsel "knows his client is guilty" permissible where "prompted and not unnatural"); *Gridley* v. *United States*, 44 F.2d 716 (6th Cir.), *cert. denied*, 283 U.S. 827 (1930). See also *Keys* v. *United States*, No. 18,786, decided April 29, 1965 (nonreversible rebuttal to comparable defense argument about consequences of not guilty by reason of insanity verdict); *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 26, 254 F.2d 725, 729, *cert. denied*, 356 U.S. 931 (1957); *People* v. *Reade*, 1 N.Y.2d 459, 462, 154 N.Y.S.2d 27, 30 (1956).

III. The accomplice instructions were proper.

(Tr. 6-14, 17, 24-25, 30, 52-62, 68, 75, 624-625, 629-631, 669-670)

The trial court told the jury that "anyone who, knowingly and voluntarily, cooperates with, aids, assists, advises or encourages another in the commission of a crime, is what is called an accomplice" (J.A. 35, Tr. 629). That is the accepted definition of an accomplice in this Circuit. *Egan* v. *United States*, 52 App. D.C. 384, 390, 287 Fed. 958, 964 (1923). The court further warned the jury that it should receive the competent, admissible testimony of an accomplice with caution and scrutinize it with care, giving it such weight as the jury believed it entitled to receive, including convicting the accused upon it alone, only after such careful and cautious consideration (J.A. 35-36, Tr. 629-630). That is the essence of the cautionary instruction this Court and the Supreme Court have deemed it the better practice to give where accomplice testimony forms the major part of the Government's case. *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917); *Holmgren* v. *United States*, 217 U.S. 509, 523-524 (1910); *Bishop* v. *United States*, 100 U.S. App. D.C.

88, 89, 243 F.2d 32, 33 (1957); *McQuaid* v. *United States*, 91 U.S. App. D.C. 229, 230, 198 F.2d 987, 988 (1952), *cert. denied*, 344 U.S. 929 (1953); *Mendelson* v. *United States*, 61 U.S. App. D.C. 127, 129, 58 F.2d 532, 534 (1932); *Egan, supra; Freed* v. *United States*, 49 App. D.C. 392, 394-397, 266 Fed. 1012, 1014-1017 (1920).

Appellants' quarrel then is only with the legal validity of the trial court's application of the proper definition of accomplice to the record evidence of the activities of Government witnesses Charles Richardson and Louis McMurray. Richardson testified that, for three weeks in late July and August of 1962, he rented the basement of 6214 Third Street, Northwest, to appellant Skeens, who had informed him that he wanted to operate a numbers business from the office and said he would protect Richardson's telephone number by using an answering service (Tr. 6-7, 10). Richardson knew that Skeens, Simpson, and Renner whom he also identified, were using the place as Skeens had promised they would, because he observed them taking numbers over the telephone (Tr. 8-11). Richardson admitted that he was aware that he was leasing his premises to persons who wanted to use them to violate the law, that he knew he was violating the law by tolerating gamblers on his premises, that he was even willing to allow appellants to move their business to his gas station in Virginia (Tr. 12-14, 17, 24-25, 30). On the basis of this evidence, the trial judge properly directed the jury's attention to her recollection that Richardson testified that he knowingly rented space to a numbers operation and equally properly instructed them, as a matter of law, that if Richardson did what he said he did, his own testimony would make him an accomplice (J.A. 35, Tr. 629). The court, therefore, did follow *Egan, supra*, 52 App. D.C. at 392, 287 Fed. at 966, by turning Richardson's status as an accomplice into a question of law, given the jury's primacy in recollecting what was said during the course of the trial (J.A. 33, Tr. 624-

625). Indeed, it was immediately after the court held that, if Richardson in fact said what it remembered, he was an accomplice, that the court gave the full cautionary instruction.

McMurray's situation was entirely different. Although McMurray was employed by Richardson's air conditioning company at 6214 Third Street, Northwest, had seen all of the appellants there, save Flanagan, answering phones and writing on pads, and had been told by Simpson that he was running a numbers operation and by Skeens that they had to move to avoid the law which was closing in on them, McMurray's only active contact with appellant's enterprise came when, by phone, he placed losing bets with them on two occasions (J.A. 21-24, 26, Tr. 52-57, 68). He never accepted any phone calls there, never did any work around the place in connection with the operation, did not assist with the installation of phones in the office, and had no business relationship with appellants, other than as a two-time customer (J.A. 24-25, Tr. 57-62, 75).

Mere failure to report known criminal conduct to the police does not transform the silent citizen into an accomplice whose active assistance or encouragement of that conduct may make him an unreliable witness because of his desire to avoid imprisonment by turning state's evidence on those whose criminal venture he helped. Nor does a person who makes use of criminal facilities once or twice for his own pleasure aid and abet the operators of those facilities so as to be judicially considered as a companion force in producing crime. The consumer is not an accomplice of the producer or salesman. *Jackson* v. *United States*, 48 App. D.C. 269, 271 (1919) (witnesses who personally committed acts of immorality in a bawdyhouse are not accomplices of defendants charged with maintaining a house of prostitution); *Papalia* v. *United States*, 243 F.2d 437, 441 (5th Cir. 1957) (purchasers of twenty-five jugs of moonshine are not accomplices of conspirators charged with selling untaxed liquor).

Persons who merely play in the game or at a gambling place are not legally regarded as accomplices of those who are being prosecuted for conducting the gambling. *Carney* v. *State*, 293 P.2d 632, 634-635 (Okla. Crim. Ct. App. 1956); *State* v. *Chitwood*, 73 Ariz. 161, ——, 239 P.2d 353, 356-357 (1951), *rehearing*, 73 Ariz. 314, 240 P.2d 1202 (1952); *McFarland* v. *State*, 140 Tex. Crim. 533, ——, 146 S.W.2d 188, 189 (1940) (compare treatment of person in whose house lottery is set up as accomplice at 171); *State* v. *Smiley*, 167 Wash. 342, ——, 9 P.2d 370, 371-372 (1932); *Simon* v. *State*, 149 Ark. 609, ——, 233 S.W. 917, 918-919 (1921); *People* v. *Wright*, 100 Misc. 205, ——, 165 N.Y. Supp. 386, 390 (Albany Cty. Ct. 1917); *State* v. *Wakely*, 43 Mont. 427, ——, 117 Pac. 95, 99 (1911); *People* v. *Bright*, 203 N.Y. 73, ——, 96 N.E. 362, 364 (1911); *Prendergast* v. *State*, 41 Tex. Crim. 358, ——, 57 S.W. 850, 851 (1899); *People* v. *Emerson*, 6 N.Y. Crim. 157, ——, 5 N.Y. Supp. 374, 375-376 (Sup Ct Spec. Term. 1888).

The trial court properly ruled that McMurray's testimony, as it recollected that testimony, would not make him an accomplice, rejecting appellants' objections (J.A. 36-37, 38-39, Tr. 631, 669-670).

IV. There was no error in permitting the jury to separate during its deliberations or in allowing it to deliberate until it reported a partial deadlock.

(Tr. 672-74, 687-88, 690-92, 694, 698-99, 702-04, 710-11)

Appellants' final contention is twofold: first, that it was error to permit the jury to separate overnight during its deliberations, and second, that it was error to permit the jury to deliberate more than one hour plus two days. Both prongs of this argument are without merit.

After almost six full days of testimony and argument, in a case involving four defendants and six counts (one charging conspiracy), the jury retired to commence de-

liberations at 3:55 p.m.[1] on Thursday, October 15, 1964. At 5 p.m., without objection, the court recalled the jurors and excused them until 10 a.m. the next morning (J.A. 39-40, Tr. 672-74). Early during the court day on Friday, October 16, the jury requested certain exhibits, which were not produced to it until about 11:30 a.m. (J.A. 41, Tr. 687). Luncheon consumed the period between 12:30 and 1:45 on that day (J.A. 41, Tr. 687), so that when the jury entered the courtroom at 5:15 p.m. (J.A. 42, Tr. 688) it had deliberated altogether approximately five and one half hours. Counsel for appellants at this point objected to the jury being continued further, on the ground that "any further concentration on the part of the jury would be prejudice." (J.A. 41, Tr. 686). However, in view of the short period of time during which the jurors had actually been engaged in discussion, and because there had been no indication that they found themselves unable to agree, the court declined to discharge the jury (J.A. 41, Tr. 687). After the intervening weekend, the jurors deliberated throughout the day on Monday, October 19, without a whisper of deadlock (J.A. 43, Tr. 690). The court excused them overnight at 5 p.m., whereupon appellant's counsel moved for a mistrial, claiming that the issues were not "that complex" and that the jury was "being subjected to coercion and duress" (J.A. 44, Tr. 691). Since no conspiracy case is "uncomplicated" and the jury had at no time suggested that it could not agree or that it wished to be discharged, the court denied this motion (J.A. 44, Tr. 691-92). Shortly before 11 a.m. on the morning of Tuesday, October 20, the jurors reported that they were hopelessly deadlocked (J.A. 45, Tr. 694). Recalled to be given the *Allen* charge,[2] the jury revealed that it was not entirely deadlocked, but had in fact concluded that all appellants were guilty on the

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[1] While the transcript reflects that the jury retired at 3:55 p.m. (J.A. 39, Tr. 672), the records of the court clerk indicate that the jury left the courtroom at 4:10 p.m. The difference is immaterial.

[2] *Allen* v. *United States*, 164 U.S. 492 (1896).

fourth count in the indictment (J.A. 47-49, Tr. 698-99, 702-04).[3]

At no time during the trial did counsel suggest that the jury should be sequestered during its deliberation. While such a procedure may be prudent in sensational cases or where there is serious danger of improper influences being brought to bear on jurors should they be released temporarily from the custody of the marshal, most federal courts including this one leave the question of sequestration to the sound discretion of the trial judge. *Holt* v. *United States*, 218 U.S. 245 (1910); *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 367, 165 F.2d 225, 229 (1947), *cert. denied*, 333 U.S. 829 (1948) *Brown* v. *United States*, 69 App. D.C. 96, 99 F.2d 131, *cert. denied as untimely*, 305 U.S. 562 (1938); *McHenry* v. *United States*, 51 App. D.C. 119, 276 Fed. 761 (1921); *Estes* v. *United States*, 335 F.2d 609, 615 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); *Lucas* v. *United States*, 275 Fed. 405 (8th Cir. 1921), *cert. denied*, 258 U.S. 620 (1922); see *Stevens* v. *United States*, 227 F.2d 483 (10th Cir. 1955); *Kleven* v. *United States*, 240 F.2d 270, 273 n. 1 (8th Cir. 1957) (*dictum*) (*Holt* establishes a rule applicable to all periods before return of verdict).

Appellants' sole reliance is on *United States* v. *D'Antonio*, 342 F.2d 667 (7th Cir. 1965), which appears to be a sport in the law. The majority in that case distinguished *Lucas* v. *United States*, *supra*, on the ground that there the separation occurred because joint accommodations for the jurors were unobtainable. It distinguished the *Holt*, *Wheeler*, and *McHenry* cases, *supra*, on the ground that they upheld separations "during trial." Circuit Judge Swygert, dissenting, found, and appellee submits, that these are not differences meriting distinction. 342 F.2d at 671-72. The word "trial" clearly encompasses the period of the jurors' deliberations, and the opinions in *Holt*, *Wheeler*, and *McHenry* do not indicate that the

[3] When the jury later indicated it could agree no farther, it was discharged (Tr. 710-11).

courts intended to hold that only separations *before* the case goes to the jury are in the discretion of the judge. This Court did not so limit *Holt* and *McHenry*, for it cited both these cases as support for the proposition announced in *Brown* that the trial judge may, in the exercise of his sound discretion, permit the jury to separate while it is considering its verdict. And in *Wheeler*, one of the "during trial" cases, this Court relied on *Brown*.

Thus the clear weight of authority supports the position of Circuit Judge Swygert that it rests in the sound discretion of the trial judge whether or not to sequester a a jury during trial, including the period of its deliberations, and that unless this discretion is abused or prejudice results, the verdict must stand. In fact, in *Coppedge* v. *United States*, 106 U.S. App. D.C. 275, 278, 272 F.2d 504, 507 (1959), *cert. denied*, 368 U.S. 855 (1961), this Court noted that today,

> under normal conditions juries are customarily permitted to separate, even over weekends, and, unless there be exceptional circumstances, they should be permitted to do so.

In the instant case, no appellant requested that the jury be sequestered during its deliberations. This in itself would distinguish *D'Antonio*, where an objection was made to the separation. Here, as recommended in *Brown* v. *United States*, *supra*, before each separation the court carefully admonished the jurors not to discuss the case except with all twelve jurors present in the jury room (J.A. 42, 43, Tr. 673, 688, 690). There is not the slightest intimation that any juror disregarded these plain instructions or that the verdict of any juror was influenced by anything other than what occurred in open court or in the jury room. These proceedings contain no error.

Finally, appellants contend that the trial judge abused her discretion by permitting the jury to deliberate more than two full days plus one hour. It is unclear how appellants arrive at the conclusion that the deliberations during these two days plus one hour were not subject to

"the internal pressures that come into a jury room, after prolonged deliberation" (App. Br. 19), but that the deliberations during the one hour on Tuesday before the jury reported its partial verdict were tainted and not "fair, impartial, and calm" (App. Br. 19). Furthermore, it is quite likely that the jury concluded that appellants were guilty on the fourth count in the early hours of its deliberations, and spent the remaining hours debating guilt or innocence of the remaining counts, on which the jury eventually hung. A trial judge always has discretion to require a jury to deliberate further or to discharge it. *E.g.*, *Mendelson* v. *United States*, 61 App. D.C. 127, 130, 58 F.2d 532, 535 (1932); *Mills* v. *Tinsley*, 314 F.2d 311 (10th Cir.), *cert. denied*, 374 U.S. 847 (1963); *United States* v. *Minieri*, 303 F.2d 550, 555-56 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *Bernal* v. *United States*, 241 Fed. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918). As Judge Matthews pointed out, "juries are not timid about telling you they are deadlocked, if they are" (Tr. 692). In this case involving four defendants and six counts, one charging conspiracy, to discharge the jury while it was freely deliberating, when it had never indicated a desire to cease deliberations, would border on an abuse of discretion.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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PETITION FOR REHEARING *EN BANC*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,196

FRANCIS A. SIMPSON, JR., *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,197

JAMES T. SKEENS, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,198

JOHN C. RENNER, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

No. 19,199

FEDORA A. FLANAGAN, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

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No. 19,199

FEDORA A. FLANAGAN, *Appellant*,
v.
THE UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING *EN BANC*

Come now Appellants in the above captioned causes, by their attorneys, and petition this Honorable Court for a rehearing *en banc* in said causes, and for grounds therefore state as follows:

On September 21, 1965, a division of this Court entered a judgment in the above captioned causes, without opinion, affirming the judgment of the District Court wherein Appellants were convicted of one (1) count of a six (6) count indictment charging violations of local and federal

gambling laws. The jury was unable to agree with respect to the remaining counts of the indictment, and these counts will be re-tried shortly.

These appeals presented two (2) very substantial questions of law. Although there may be many reasons why the Court does not write opinions in certain cases, we know that these appeals were not frivolous and we submit that this Court in its entirety should commit itself to a full discussion of certain principles involved in the instant appeals.[1]

These appeals presented issues involving the existence of probable cause in the issuance of a search warrant for a home in the District of Columbia. The facts and law are set forth in Appellants' brief and Appellee's brief. The search warrant and the affidavit in support thereof are set forth at JA 1-11.

Critical to the determination of the existence of probable cause was the extent to which a criminal record may furnish probable cause. In conjunction with "what," will it furnish probable cause? The Supreme Court of the United States has said that a criminal record may be material on the issue of probable cause. *Brineger v. United States*, 338 U.S. 160, 172-174. When may it, and when may it not? What weight must a magistrate issuing a search warrant give to it? It cannot of itself furnish probable cause. *Beck v Ohio*, 379 U.S. 89, at 97.

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[1] A discussion of the principles involved on the search warrant issue would, we submit, be of great assistance to the Bar and to magistrates issuing search warrants.

The Court's failure to write an opinion, almost always reflects adversely on the appellant's attorney, for the client, being a lay person, believes that the Court thought that the "substantial questions of law" his attorney contended for, really, after all, were not so substantial in the opinion of the Court and probably frivolous.

Since the remaining portions of the affidavit in support of the search warrant, contained merely a recitation of ordinary conduct, without any evidence of bets or use of gambling paraphernalia, multiple telephones, etc., and information by informants without any underlying circumstances being demonstrated as to either their reliability, the reliability of their information or the basis upon which they drew their conclusions, we submit that the existence of the criminal records must have formed a substantial basis or at least a weighty one in the determination of the existence of probable cause.

The fact that several months prior to commencement of the three month investigation, a prospective defendant allegedly beat up an informant for welching on a gambling debt could not be the basis for issuing a search warrant for a home where the prospective defendant was seen, when the alleged crimes being committed therein had nothing to do with the assault case.

The second substantial question of law, which we submit merits discussion is the prosecutor's use of phraseology in his closing argument to the jury, that if certain persons had been called as witnesses, which potential witnesses were linked to the defendants by an exhibit confiscated in the raid containing their first names and telephone numbers, such potential witnesses would have refused to talk or have taken the Fifth Amendment.

We respectfully submit that to permit such argument is clear error, and since the potential witnesses alluded to were linked to the defendants, the error was prejudicial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that these appeals should be reheard by the Court *En Banc*.

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CERTIFICATE OF COUNSEL

The foregoing Petition for Rehearing *En Banc* is presented in good faith and not for purposes of delay.

Edward L. Carey

Walter E. Gillcrist

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Rehearing *En Banc* by hand on John Conliff, Esq., United States Attorney for the District of Columbia, this 6th day of October, 1965.

Edward L. Carey

Walter E. Gillcrist